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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 701

IN THE MATTER OF BUDDY LYNN WHITTINGTON.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FAIRFIELD COUNTY

BRIEF FOR THE PETITIONER

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INDEX

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Questions Presented	22
Summary of Argument	23
ARGUMENT	29
Introduction	29
I. Petitioner Was Denied Due Process and Equal Protection by Reason of the Standard of Proof Applied by the Courts Below	37
II. Petitioner Was Denied Due Process and Equal Protection Because He Was Not Afforded a Fair Trial by an Impartial Trier of Fact	57
III. The Juvenile Court Denied Petitioner Due Process by Admitting Into Evidence Statements Obtained in Violation of His Privilege Against Self-Incrimination and His Right to Counsel	76
IV. Petitioner Was Denied Due Process and Equal Protection by Being Deprived of the Right to Pre-Hearing Release and Subjected to Cruel and Inhuman Punishment Both Before and After the Adjudicative Hearing	86
CONCLUSION	104
APPENDIX A	1a
APPENDIX B	28a
APPENDIX C	29a

Page

TABLE OF AUTHORITIES

CASES:

Adams v. *Fleck*, 171 Ohio St. 451, 172 N.E.2d 126 (1961) 49-50
Amos Treat & Co. v. *SEC*, 306 F.2d 260 (D.C. Cir. 1962) 59
Baumgartner v. *United States*, 322 U.S. 665 (1944) 50, 55
Beckley Newspapers Corp. v. *Hanks*, No. 467, O.T. 1967 55
Brastein v. *Sedivy*, 153 N.E.2d 541 (Ohio Prob. Ct. 1957) 50
Brinegar v. *United States*, 338 U.S. 160 (1949) 39
Campbell v. *United States*, 365 U.S. 85 (1961) 63
Carnley v. *Cochran*, 369 U.S. 506 (1962) 83
Commonwealth v. *Johnson*, 234 A.2d 9 (Penn. Super. Ct. 1967) 73
Commonwealth v. *Johnson*, 348 Penn. 349, 35 A.2d 312 (1944) 63
Commonwealth v. *Webster*, 5 Cush. 295 (Mass. 1850) 48
Cope v. *Campbell*, 175 Ohio St. 475, 196 N.E.2d 457 (1964) 99
Davis v. *State*, 384 U.S. 737 (1966) 85
District of Columbia v. *Clawans*, 300 U.S. 617 (1937) 66
Duncan v. *State of Louisiana*, No. 410 O.T. 1967 .. 65
Ex parte Cromwell, 232 Md. 305, 192 A.2d 775 (1963) 92
Fulwood v. *Stone*, D.C. Cir., No. 21,401 ..... 94, 98
Gallegos v. *Colorado*, 370 U.S. 49 (1962) 77, 86
Haley v. *Ohio*, 332 U.S. 596 (1948) 78
Harling v. *United States*, 295 F.2d 161 (D.C. Cir. 1961) 81

Page

In re Elmore, 222 A.2d 255 (D.C. Ct. Apps. 1966) 75
In re Gault, 387 U.S. 1 (1967) ..... *passim*
In re Lambert, 203 F.2d 607 (D.C. Cir. 1953) 71, 75
In re L. ——, 194 N.E.2d 797 (Juv. Ct. Cuyahoga Cy. 1963) 78
In re Murchison, 349 U.S. 133 (1965) 57, 58, 59, 62, 64
In re Urbasek, —— Ill.2d ——, —— N.E.2d —— (1967) 43, 47, 48
In the Interests of Carlo, 48 N.J. 224, 225 A.2d 110 (1966) 71, 85
In the Matter of Four Youths, D.C. Juv. Ct. Nos. 28-776-J, 28-778-J, 28-783-J, 28-859-J 78
In the Matter of Gregory W. and Gerald S., 19 N.Y.2d 55, 224 N.E.2d 102 (1966) 85
Irvin v. *Dowd*, 366 U.S. 717 (1961) 75

Jackson v. *Denno*, 378 U.S. 368 (1964) 71
Johnson v. *Dye*, 175 F.2d 250 (3rd Cir. 1949) .. 102
Jones v. *Commonwealth*, 185 Va. 335, 38 S.E.2d 444 (1946) 42

Kent v. *United States*, 383 U.S. 541 (1966) .....*passim*

Leland v. *Oregon*, 343 U.S. 790 (1952) 51
Locke v. *United States*, 7 Cranch 339 (1813) 40

Mastrian v. *Heilman*, 326 F.2d 708 (8th Cir. 1964) 89
McFarland v. *American Sugar Ref. Co.*, 241 U.S. 79 (1916) 38
Medley v. *State*, 134 U.S. 160 (1890) 100, 101, 102
Miranda v. *Arizona*, 384 U.S. 436 (1966) ..... *passim*
Mortensen v. *United States*, 322 U.S. 369 (1944) 55

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 54

Parker v. *Gladden*, 385 U.S. 363 (1966) 62
People v. *Garbutt*, 17 Mich. 9 (1868) 67

Page

Peyton v. *Nord*, —— N.M. ——, —— P.2d ——, 36 U.S.L.W. 2262 (1967) 71, 74
Pilkinton v. *Circuit Court*, 324 F.2d 45 (8th Cir. 1963) 89
Robinson v. *California*, 370 U.S. 660 (1962) 98, 102
Schneiderman v. *United States*, 320 U.S. 118 (1943) 50
Shick v. *United States*, 195 U.S. 65 (1904) 75
Sjogren v. *Sjogren*, 77 N.E.2d 739 (Ohio App. 1946) 50
Smith v. *Brierly*, 2 Crim. L. Rep. 2164 (3rd Cir. 1967) 84
Smith v. *McCravy*, 1 Crim. L. Rep. 2153 (Ky. Cir. Ct., May 26, 1967) 95
Speiser v. *Randall*, 357 U.S. 513 (1957) 38
Stack v. *Boyle*, 342 U.S. 1 (1952) 88
State ex rel. Peaks v. *Allaman*, 115 N.E.2d 849 (Ohio App. 1952) 89-90
State ex rel. Ray v. *South*, 176 Ohio St. 241, 198 N.E.2d 919 (1964) 100
State v. *Carter*, 175 Ohio St. 98, 191 N.E.2d 541 (1963) 49
State v. *Lowder*, 79 Ohio App. 237, 72 N.E.2d 785 (1946) 78
State v. *Miclau*, 167 Ohio St. 38, 146 N.E.2d 293 (1957) 49
State v. *Shardell*, 107 Ohio App. 338, 153 N.E.2d 510 (1958) 42
State v. *Stewart*, 120 Ohio App. 199, 201 N.E.2d 793 (1963) 78
Thompson v. *City of Louisville*, 362 U.S. 199 (1960) 56
Tot v. *United States*, 319 U.S. 463 (1943) 38
Trimble v. *Stone*, 187 F.Supp. 483 (D.D.C. 1960) 94
Trop v. *Dulles*, 346 U.S. 86 (1958) 99
Turner v. *Louisiana*, 379 U.S. 466 (1965) 62, 66

Page

United States v. *Glover*, 372 F.2d 43 (2d Cir. 1967) 78
United States v. *Morales*, 223 F.Supp. 160 (D. Mont. 1964) 85
United States v. *Romano*, 382 U.S. 136 (1965) 38
United States v. *Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1956) 79

Washington v. *Texas*, 388 U.S. 14 (1967) 65
Weems v. *United States*, 217 U.S. 349 (1910) 102
Woodby v. *Immigration Service*, 385 U.S. 276 (1966) 44, 45, 50

CONSTITUTIONS, FEDERAL AND STATE STATUTES, AND COURT RULES:

CONSTITUTION OF THE UNITED STATES:

Fifth Amendment ..... *passim*
Sixth Amendment ..... *passim*
Eighth Amendment ..... *passim*
Fourteenth Amendment ..... *passim*

FEDERAL STATUTES:

5 U.S.C. § 1004(c) 58, 59
18 U.S.C. § 3146 ..... 97, 98
District of Columbia Juvenile Court Act 71

STATE STATUTES AND RULES:

Calif. Welf. & Inst'ns Code § 625 80
Calif. Welf. & Inst'ns Code § 627.5 80
Calif. Welf. & Inst'ns Code § 635 96
Illinois Juvenile Court Act, Ill. Stat. Ann. Ch. 37, § 702-8 (Supp. 1966) 36
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Illinois Juvenile Court Act, Ill. Stat. Ann. Ch. 37, § 703-8(5) (Supp. 1966) 81

Page

New Jersey Rule 6:9-1(c) relating to procedure in the juvenile courts 35
New Jersey Rule 6:9-1(f) relating to procedure in the juvenile courts 46
New York Family Court Act § 712 36
New York Family Court Act §§ 727-729 ..... 95, 96
New York Family Court Act § 734 35
New York Family Court Act § 735 81
New York Family Court Act § 739 95
Ohio Constitution, Art. I, § 9 ..... 2, 88
Ohio Constitution, Art. I, § 10 ..... 2, 72
Ohio Rev. Code Ann. §§ 2151.01-.99 ..... *passim*
Ohio Rev. Code Ann. § 2901.05 ..... 2, 30
Ohio Rev. Code Ann. § 2937.03 89
Ohio Rev. Code Ann. § 2938.08 48
Ohio Rev. Code Ann. § 2945.04 48
Ohio Rev. Code. Ann. § 2945.07 69
Ohio Rev. Code Ann. § 2945.17 72
Ohio Rev. Code Ann. § 5139.05(C) 31
Ohio Rev. Code Ann. § 5139.06(A) 31
Ohio Rev. Code Ann. § 5139.24 31
Ohio Rev. Code Ann. § 5143.03 31

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Page

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H. Rep. No. 177, 75th Cong., 1st Sess. (1937) .. 71

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Page

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Page

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BRIEF FOR THE PETITIONER

Opinion Below

The memorandum opinion of the Ohio Court of Appeals for the Fifth District appears at Appendix 255 (hereinafter cited as "A." ——). It is reported at 13 Ohio App. 2d 11. The journal entry of the Court pursuant to its memorandum opinion appears at A. 272.

The journal entry of the Ohio Supreme Court dismissing the appeal for want of a substantial constitutional question appears at A. 274.

Jurisdiction

The orders of the Ohio Supreme Court dismissing the appeal and denying the motion to certify the record were entered on March 15, 1967. (A. 274.) The petition for certiorari was filed on April 11, 1967, and was granted on

October 9, 1967. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., § 1257(3).

Constitutional Provisions and Statutes Involved

This appeal involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; the Ohio Constitution, Article I, §§ 9, 10; the Ohio juvenile court statutes, Ohio Rev. Code Ann. §§ 2151.01-.99; and Ohio Rev. Code Ann. § 2901.05. Pertinent provisions are reprinted in Appendix A, *infra*.

Statement of the Case

This is an appeal from the judgment of the Juvenile Court of Fairfield County, Ohio, finding petitioner to be a delinquent child.

The sole basis for this adjudication of delinquency was the charge that petitioner had killed a neighbor, Mrs. Gladys Willard, in violation of the second degree murder statute of Ohio, Ohio Rev. Code Ann. § 2901.05. The District Court of Appeals held that:

> "Except for a finding that he was delinquent for having unlawfully killed Mrs. Willard, there is no other evidence upon which to base a finding of juvenile delinquency." (A. 264.)

The Crime

This case arose on July 29, 1966, in the village of Baltimore in Fairfield County, Ohio. Petitioner, an only child, lived there with his parents, Mr. and Mrs. Orville A. Whittington. He had become 14 years of age less than a week before.

Mrs. Willard, a close friend of the Whittingtons, lived across the street with her husband, Herman Willard, and one of her sons, Jack Willard, who had separated from his wife several months before. She was 63 years old. (A. 139, 145.) Other relatives of Mrs. Willard lived nearby. (A. 180-181, 194-195.)

Mrs. Willard was reported missing by some of her relatives on the afternoon of July 29. A search began, in which petitioner joined, together with other neighbors and relatives of Mrs. Willard and village law enforcement officials. People also searched their houses, and about 8 p.m., Mr. Whittington and petitioner found Mrs. Willard's body in their home, under the bed in petitioner's bedroom. She had been strangled. (A. 257-261.)

Upon the discovery of the body, principal law enforcement officials of the village and county—the police chief, the Prosecuting Attorney, a deputy sheriff, and the probation officer of the Juvenile Court—went to the Whittington home. There they interrogated petitioner, without warning him as to his privilege against self-incrimination and his right to counsel. Petitioner denied—and has consistently denied—any knowledge of how Mrs. Willard's body got under his bed. Under interrogation he stated that he had seen her about 8 a.m. that morning when she came to the rear door to return some hair curlers to his mother. (A. 261-263.)

Petitioner's Arrest and Confinement

On August 5, 1966, Elwood Phillips, Chief of Police of Baltimore, filed a complaint in the Juvenile Court alleging that petitioner was a delinquent child on the basis of the

murder of Mrs. Willard. (A. 12.)[1] This was sworn to in the presence of Judge Robert U. Hastings, who then issued a warrant for petitioner's arrest to William Rutherford, the Juvenile Court probation officer. (A. 19.)[2]

There is no doubt from the record that prior to the filing of the complaint and the issuance of the arrest warrant, Probation Officer Rutherford consulted *ex parte* with Judge Hastings about the case. There is, however, conflict and self-contradiction in Rutherford's testimony as to the extent of this consultation.

Rutherford testified that he investigated the case, conferred with Chief of Police Phillips and Prosecuting Attorney Morehart, and a decision was then made to bring charges against petitioner. He told the Prosecuting Attorney that he felt that petitioner participated in the crime. (A. 119-121.) He further testified:

> "Q. Before the affidavit was filed and before the warrant was issued by this Court, did you advise the Court of your findings?
>
> A. I advised the Court as to the situation that had happened, as to the evidence and what had happened. I didn't at that time have a lot of evidence, and the evidence was not confided to the Judge, no sir.
>
> Q. Did you advise the Court of your findings as a result of your investigation?

---

[1] This was subsequently amended to include allegations of date and place of the murder. (A. 12, 120-121.) The original complaint was served on petitioner's parents. The amended complaint was served on petitioner's attorneys. (A. 121.)

[2] This warrant also was subsequently amended to incorporate the language of the amended complaint. (A. 19.) Petitioner's parents received a copy of the original warrant, and the amended warrant was served on petitioner's attorneys. (A. 121.)

A. I advised him I had been called there and that I was there and the type of situation that arose." (A. 120.)

Rutherford subsequently testified:

"*I informed the Court of the investigation, the kind of investigation, who was involved,* but as to the evidence, I did not." (A. 121.) (emphasis supplied)[3]

Petitioner was arrested and was placed in solitary confinement in a cell in the Fairfield County jail. (A. 64.) The cell had no electric light bulb and "the toilet and everything else" were in the same place. (A. 96.) He was imprisoned in the county jail, an adult penal institution, because there was no juvenile detention facility in the county. The Judge stated that he had tried to obtain a detention home years before. (A. 97.) Petitioner's minister—who was allowed to talk to him through the bars of the cell—testified that the jail was not a fit place of confinement, and that the county had needed a new jail for 30 years. (A. 96.) The Prosecuting Attorney agreed that "the place we have for detention of juveniles is not all that is to be desired, your Honor; no argument about that. But it is the only thing that we have . . . ." (A. 68.)

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[3] Judge Hastings asserted at the adjudicative hearing that Rutherford denied consulting with him about the facts of the case prior to the complaint, and stated:

"The fact has been established that he didn't." (A. 122.)

There was no testimony from the Judge himself as to the extent of the consultation. The Judge thereafter foreclosed further inquiry by the defense into what Rutherford reported to him about the case prior to the complaint and the warrant. (A. 122-123.)

Petitioner's Motion for Release Pending the Adjudicative Hearing

Petitioner's attorneys commenced efforts to have him released on bond pending the adjudicative hearing, or to the custody of his parents, or at least transferred to the juvenile detention home in nearby Franklin County. (A. 63.)[4] On August 25, 1966, after petitioner had already been in solitary confinement in the jail for 20 days, an evidentiary hearing was held before Judge Hastings on the motion for pre-hearing release.[5]

Ten witnesses, including petitioner's neighbors, teachers, minister, and Sunday School superintendent, testified in support of this motion. As the District Court of Appeals summarized their testimony:

> "There was an abundance of evidence as to Buddy Lynn Whittington's good character and reputation prior to July 29. He was regular in attendance at school, church, Sunday School and youth groups. He had been obedient at home and at school and subjected himself to the reasonable control of both his parents and teachers." (A. 264.)

Every one of these witnesses agreed that there was no risk to the community if petitioner was released to the custody of his parents. (*E.g.*, A. 71-72, 74-75, 78-79.) One of his neighbors offered to take petitioner into his own

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[4] They moved for such relief on August 10th and 24th. (A. 24, 30.)

[5] The defense was ready for adjudicative hearing on August 11, 1966, but the State was not. (A. 110.) The case was continued until August 24, 1966, at which time the State was still not ready for trial on the merits. (A. 41, 111.)

home pending the hearing. (A. 81.) Another neighbor gave the following testimony:

> "Q. And if the Court would see fit to place Buddy under a bond or in the custody of his parents during the pendency of this case, would you have on behalf of your family or your children or yourself or your neighbors, have any fear that there would be any risk involved?
>
> A. No sir. There is more fear right now, than what there would be if Buddy were out.
>
> Q. There's more fear in what way?
>
> A. All ways. We're sure Buddy didn't do this. We don't know who did it.
>
> Q. In other words, there's feeling in the community that someone else may have done this?
>
> A. Yes." (A. 78-79.)

Several other witnesses gave similar expression to the belief that petitioner was innocent until proved guilty. (*E.g.*, A. 82, 85-86, 88.) Petitioner's Sunday School superintendent stated:

> "I feel that he's not guilty and I feel there is no risk." (A. 92.)

Petitioner's mother testified that she visited him in jail, and:

> "he sits there all day long; sometimes he doesn't say much when we go in. I think his mind might be dulled by being there. There's nothing for him to do, just sit there. It would affect your mind, too, or anybody's." (A. 100.)

Petitioner's mother and father both testified that in their opinion it would be injurious to his health and well-being for him to remain in the jail. (A. 99, 102.) They said that they would devote themselves full time to his care and supervision if he were released to their custody pending the hearing, would be responsible for his appearance at all court hearings, would sign a bond putting up their home for security if necessary, and would accept any other condition on his release that the Court might impose. (A. 98-100, 102.)

The Prosecuting Attorney offered no evidence to rebut this showing. His cross-examination consisted essentially of asking the witnesses if their opinion as to the risk from petitioner's release would be different if they believed petitioner guilty. (*E.g.*, A. 76-77, 79, 85-86.) He stated:

> "The fact that the parents of the child here are good people, I don't think that that has much to do with the question here involved, your Honor, as to whether he should be released or not . . . . I don't care how law abiding the boy has been, if he committed the act with which he is charged here, then I say that it is of such a serious offense and of such a serious nature that he should not be released to these parents or not be released to anyone else while this is pending." (A. 68.)

At the conclusion of this hearing, Judge Hastings denied pre-hearing release with the following statement:

> "This isn't a case of what public opinion, popularity poll, might be about this thing. This Court has a responsibility to this community. This Court has a responsibility to this young man. Motion denied." (A. 104; see also A. 40.)

Petitioner was returned to his solitary confinement.

The Adjudicative Hearing

The hearing to adjudicate the delinquency charge was held September 2, 1966. Several motions by petitioner's counsel, challenging the validity of the proceeding under various provisions of the Federal Constitution, were denied at the outset. These included:

(1) A motion for dismissal of the proceeding because of denial of petitioner's right to pre-hearing release and his subjection to cruel and inhuman punishment by his solitary confinement in an iron cage in the county jail, which had by then already lasted 27 days. (A. 45-46, 108-109, 114.)

(2) A motion to suppress all statements derived from his interrogation by law enforcement officials without warning as to his privilege against self-incrimination and right to counsel. (A. 46, 109, 123-125.)

(3) A motion to dismiss the proceeding because of the unconstitutionality of the Ohio juvenile code in denying him a fair and impartial trial. (A. 114, 123.) In this regard, petitioner asserted that the Ohio code, by authorizing the Court's own probation officer to investigate the case and report to the judge about it, providing for the same judge to pass on the issuance of an arrest warrant, and empowering him then to try the case on the merits, precluded a fair and impartial trial. (A. 42-43, 115-117.)[6]

[6] Petitioner's counsel also moved for dismissal because immediately prior to the commencement of the hearing, the Judge, Probation Officer Rutherford, Police Chief Phillips, Prosecuting Attorney Morehart, and two other witnesses to be called at the hearing, were seen conferring together in the Clerk's Office; other witnesses to be called by the State were in the witness room next door, with

In substance, the case against petitioner consisted of the fact that Mrs. Willard's body was found under his bed, together with circumstances, opinion testimony, and his statements under interrogation, from which the State sought to raise the inference that he was the last person to see her alive. This evidence was as follows:

1. The county coroner testified that he examined the body about 8:45 p.m. on July 29, 1966; that in his opinion death had occurred approximately 12 hours before, *i.e.*, between 8 and 9 a.m.; and that in his opinion the body had been lying in the same position for about 12 hours. (A. 153-154.) The State also sought to establish the same approximate time of death by a pathologist from Ohio State University, who estimated it as from one and a half to three hours after Mrs. Willard ate her last meal. (A. 166-167.) Herman Willard, the decedent's husband who was a farmhand employed on a nearby farm, testified that they had breakfasted together about 5:45 a.m. on July 29, before he went to work at 6:00 a.m. (A. 132-133.)

2. Mrs. Aurilla Goodrich, Mrs. Willard's sister, testified that she had been expecting Mrs. Willard to come to their mother's home about 10:30 a.m.; she called the Willard home several times when Mrs. Willard did not arrive and

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an opening between the two rooms which allowed all conversations to be heard in either room. The Judge summarily overruled this motion, and the record is silent as to what was said at this *ex parte* conference. (A. 106.)

Other grounds for dismissal asserted were denial of the right to a speedy trial and failure to provide a court reporter who could read back questions from her notes as asked. (A. 46-47, 109-110.)

A previous motion, filed August 10, 1966, had asked for dismissal on the ground that the entire juvenile court act was unconstitutional (A. 27); it had been denied August 11, 1966. (A. 37.)

got no answer; and, becoming concerned, she went with her husband to the Willard home about 12:10 p.m. and found no one there. She said that she then knocked on the door of the Whittington home across the street and petitioner came to the door. She quoted petitioner as telling her that his parents had gone to Canton early that morning and that Mrs. Willard "was over there that morning and brought some curlers back." (A. 181-183.)

3. Police Chief Phillips testified that during the search for Mrs. Willard that afternoon, he had talked to people in the village. He said that the only people he found who had seen Mrs. Willard that day were a Mrs. Estep, who saw her feeding her chickens about 6:30 a.m., and a Mrs. Barber, who saw Mrs. Willard drawing water in her own yard about 7:30 or 7:45 a.m. (A. 203.)

He also testified:

> "Q. Would you know, Mr. Phillips, in checking the people of the community or any of the neighbors and so forth, did you find anybody who saw Mrs. Willard, Gladys Willard, alive after eight o'clock in the morning?
>
> A. No." (A. 211.)[7]

4. Chief Phillips also testified as to his interrogation of petitioner on the night of July 29.[8] He had known peti-

[7] Phillips also stated that he had "checked out" alibis on members of the Willard family after the crime. (A. 210.) He said that he had asked neighbors if there were any "strange" people in the neighborhood that day and had found nobody. (A. 211.) Phillips' hearsay testimony was admitted without objection.

[8] This was over continuing defense objection that any statements of petitioner were obtained in violation of his federal constitutional rights. (A. 206-207.)

tioner for six or eight years. (A. 202.) He recounted petitioner's oral statements to him under interrogation as follows:

"A. 'I asked Buddy if he were there all morning, and he said "Yes." And I asked him if he was alone, and he said, "Yes." I asked him if he had seen Mrs. Willard, and Buddy stated yes, she had come to the door about eight o'clock, returned the curlers and left, but he did not know where she went.'

Q. By the way, did you see these curlers?

A. Yes, I saw the curlers.

Q. Where were they at the time you saw them?

A. They were in the kitchen." (A. 207.)

* * * * *

"Q. Did you have any further conversation with Buddy Whittington at that time?

A. Yes. I asked Buddy if he were there all day and he said he'd been out part of the day hunting Mrs. Willard; and, in fact, he said all day, about all day he had been hunting Mrs. Willard. And I made the statement that we were not called—she was not officially reported missing until three o'clock. Buddy stated he was out long before that and mentioned 11:30.

Q. You mean, mentioned 11:30?

A. Mentioned that he had been hunting her.

Q. Since 11:30?

A. Since about 11:30." (A. 208.)[9]

According to Chief Phillips, petitioner also stated that his parents had left early that morning, that he did not

[9] Mrs. Goodrich testified that petitioner had helped her and her husband search for Mrs. Willard shortly after noon. (A. 185-187.)

go to school that morning because he was sick, and that after his parents left he went in and lay down on the bed and turned on his record player. (A. 208-209.)

Chief Phillips also described a colloquy he had with Mr. Whittington, petitioner's father, during the course of this interrogation:

> "I've known him for years and years and always called him [Mr. Whittington] Bud, and I asked Bud if he knew what might have happened, and Bud stated, 'I don't know, unless this boy.' Buddy was standing right beside him." (A. 209.)

Testimony as to petitioner's statements under interrogation was also given by another interrogator, Probation Officer Rutherford. He said:

> "In talking with Buddy, he told me *he got up that* morning and dressed, and was going to go to school; but that after his parents left, he felt ill and he didn't go to school. And I was informed at that time that he attended a summer class at the Liberty Union School, or the Liberty Union High School, taking a course in mathematics, and he didn't go to school because he felt ill.
>
> Q. Did he tell you the nature of his illness?
>
> A. He said he had a stomach-ache.
>
> Q. Any other conversation?
>
> A. Yes. I asked him if he'd seen Mrs. Willard that day, and he told me that he had. That some time about eight o'clock, she come to the door to return some curlers that his mother had loaned her, or used in fixing Mrs. Willard's hair.
>
> Q. Did he say what door she came to?

A. Said she came to the rear door, and he said he didn't recall just exactly what she said, but she said something like, 'You-Who, anybody home?' Something like that. He just didn't recall exactly what it was, but he got up and went to the door. She handed him the curlers and he laid them there on the chair, I believe, or the table. I believe, it was the chair. And she turned and walked away. He said he didn't know which way she went, that he went back and lay down on the bed." (A. 218.)

Rutherford further testified:

"I asked Buddy if he had any idea of how Mrs. Willard's body had got under the bed, and he said he didn't know anything about it. I asked him if he had seen anybody else around the neighborhood that day, If there had been anybody come to the door, if there was anybody in the house; he said he hadn't seen anybody. I asked him if he'd left some time close to noon. He didn't know exactly what time it was. He thought it was some time right after eleven o'clock, but he wasn't sure. He said he left after a lady came who was a sister of Mrs. Willard and told him that Mrs. Willard was missing. Then, I think, he said he changed his clothes and went to the berry patch to look for Mrs. Willard."

• • • • •

"I asked him—he told me he'd gone to look for her and I asked him how he knew she was missing. And he said this lady had come and told him, asked if she was at the house and asked him if he knew anything about her, that she'd been missing. They couldn't find her. He then said that he went to look for her, and in the afternoon after he'd looked for her, looked in the

berry patch, then he came back and went to baseball practice." (A. 218-219.)

The circumstances under which this interrogation took place appear from the record as follows: Chief Phillips was called back to the Whittington home about 8:20 p.m., after the discovery of the body by Mr. Whittington and petitioner. He and Chief Grile of the Fire Department went in and saw petitioner and his father there. (A. 203-204.) After examining the body, Phillips called the Sheriff's Department to get the coroner and the photographer. The coroner, the photographer, and Deputy Sheriff Berry arrived. (A. 206.)

After the coroner's examination and the photographing of the room, Phillips and Berry began to interrogate petitioner. Petitioner's parents were present during the interrogation, which took place in the Whittington home. (A. 206.) Prosecuting Attorney Morehart and Probation Officer Rutherford arrived during the course of the interrogation. (A. 209.) Its total duration is not established precisely by the record, but Rutherford testified that he was called by the Sheriff's Office shortly after 10:00 p.m. to go to Baltimore at the request of the Prosecuting Attorney. (A. 119.)

At one point Rutherford accused petitioner of committing the offense, according to petitioner's father. (A. 237.) During the period of the interrogation, the law enforcement authorities were controlling access to the Whittington home: the photographer was admitted by Chief Phillips (A. 127); the coroner was "conducted into the home by Chief Phillips (A. 151); Rutherford found the door locked when he got there, and was admitted by Deputy Sheriff

Berry (A. 217); and Mrs. Goodrich, the decedent's sister, was ordered out of the Whittington home by the Fire Chief when she tried to go in to see her sister's body. (A. 191.)

Although the Prosecuting Attorney stated at the outset of the hearing that "the evidence will probably bring out that the defendant was warned" of his privilege against self-incrimination and his right to counsel (A. 124) it never did so.[10]

Against the evidence by which the State sought to connect petitioner to Mrs. Willard's death, there emerged a mass of conflicting testimony from the State's own witnesses:[11]

1. On cross-examination of the medical experts, the time of Mrs. Willard's death—which the State had tried to establish was about 8:00 a.m.—became indefinite. The coroner testified that death could have occurred "eleven to sixteen hours or more" before the time of his examination at 8:45 p.m. that night. (A. 160.) The pathologist testified that from the condition of the body, death could have occurred at any time on July 29. (A. 167.)

2. The place of death became equally uncertain. The coroner testified:

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[10] In arguing that *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was inapplicable, he stated: "I think the case has gone way too far as it is, and I don't think certainly that it should be extended." (A. 125.)

[11] Petitioner offered no witnesses at the adjudicative hearing, but it was stipulated that the testimony at the bond hearing attesting to his good character and reputation should be considered part of the record of the adjudicative hearing. (A. 239.)

"Q. Could the body, in your opinion, have been someplace else other than in the position that you found it at any time after the death occurred?

A. It is quite possible. I do not know where she was killed."

* * * * *

"Q. Doctor, could the body have been at some other location in this same position and moved over to the location as shown in State's Exhibit 1?

A. That's true." (A. 160.)

There was no evidence of disarray in petitioner's room or the Whittington home, although whoever killed Mrs. Willard did so with such force as to break four of her ribs. (A. 164, 233.) In the opinion of the coroner, Mrs. Willard had not been pushed under the bed but whoever committed the crime had lifted up the full-sized bed, placed the body underneath it, and then replaced the bed. (A. 156, 299; State's Exhibits 1-4.)

3. Access to the Whittington house by other persons was readily available. The key was kept outside the house in the corner of the patio and could be seen from the outside. (A. 234-235.) When the parents returned, the key was not in its usual place. (A. 225.)

4. There is no dispute that petitioner was out of the house at various times during the day. Shortly after noon he helped Mrs. Goodrich and her husband search for Mrs. Willard in the berry patches. (A. 185-187.) About 4:00 p.m., Chief Phillips ran into him still looking for Mrs. Willard with other boys in the village; petitioner helped Phillips hunt for her. (A. 208.) His parents returned home

about 7:30 p.m., and he was practicing baseball with the Little League team on the school grounds at that time. (A. 225.) He told his father that he had also been out of the house that morning, three lots away and back in a berry patch with his B-B gun, at places from where the back door of his house could not be seen. (A. 236.)

5. Mrs. Willard's whereabouts and movements during the day were uncertain. Members of her family believed that she had gone picking blackberries when she did not appear at her mother's that morning. They testified that she was accustomed to pick berries in good weather, and the initial search for her was in the berry patches. They also said that she usually untied her dog when she went berry picking so that it could follow her; the dog was found running loose by Chief Phillips during the afternoon. (A. 181-182, 193, 197, 212-213.)

6. There was no motive or reason for petitioner to kill Mrs. Willard, nor did he show any consciousness of guilt. Her husband said that Mrs. Willard was a good friend of the Whittingtons and petitioner. (A. 145.) Although Mrs. Willard's clothing was disarrayed as if her assailant might have had sexual designs on her, there was no medical evidence of sexual attack. (A. 163-164.) When the body was discovered, petitioner said "Oh, no," or "Can't be," and according to his father: "He was about as much surprised as I was, I think . . . . He was shocked about it. I could tell." Prior to the discovery of the body, "he was just as normal as he could be . . . ." (A. 228, 235.) Chief Phillips, when asked petitioner's reputation in the community, replied: "I've never had a minute's trouble with Buddy, let's put it that way." (A. 212.)

7. On the other hand, petitioner's father testified that there had been constant quarreling for the last two years between Mr. and Mrs. Willard, which could be heard from almost any room in the Whittington house. (A. 235.) Mr. Whittington said that he first began to search his own home because: "her and her husband had trouble, and Jack's there; and him and his wife have a lot of trouble. And I thought it was more than she could take, and I figured she would rather die in our house than in her own home." (A. 227.) The Willards' son Jack agreed that there was quarreling between his parents which might have been heard 200 feet away if the windows were open. (A. 177.)

8. Herman Willard, the decedent's husband, admitted on cross-examination that he drove his car home at 8:16 on the morning of the murder. (A. 140.) He was then induced to correct his testimony on redirect examination and denied that he had come home at any time between 6:00 a.m. and 2:00 p.m., the time he said he learned that his wife was missing. (A. 143-144.) With respect to his admission of coming home on the morning of the murder, he then said on further cross-examination:

> "I may have said something that I shouldn't. I don't know. I come back in home every once in a while, but I don't know if that was the date or what. . . . I could not tell you if I drove back or not." (A. 145-146.)

He also admitted knowing that the Whittingtons were going to be out of town on the day of the murder. (A. 149.)

The Juvenile Court's Finding

At the close of the State's evidence the defense moved for dismissal of the complaint on the ground that the

charge had not been proved. (A. 237.) Judge Hastings took a ten-minute recess and overruled the motion. (A. 239-240.) He then made the following statement:

> "The Court finds that there has been a crime committed here, that there has been a homicide committed on this alleged victim; and the Court finds that there is probable cause to believe that this young defendant may have done this act, which, if done by an adult, would be a felony." (A. 240.)

The journal entry, filed September 7, 1966, recites that the Juvenile Court:

> "finds that said Buddy Lynn Whittington is a minor under the age of eighteen years, fourteen years of age, and is a delinquent child as set forth in the complaint, and that said Buddy Lynn Whittington has committed an act which would be a felony if committed by an adult." (A. 54.)

Petitioner was ordered committed to the Juvenile Diagnostic Center of the Ohio Youth Commission for examination. (A. 56, 240-241.)

Decision of the District Court of Appeals

Petitioner appealed the adjudication of delinquency to the District Court of Appeals. (A. 58.) The Prosecuting Attorney moved to dismiss the appeal on the ground that the order was not final. (A. 248.) By order and memorandum of September 30, 1966, the District Court of Appeals overruled the motion to dismiss the appeal. (A. 249, 251.) The Court held in abeyance petitioner's motion for bond or release to his parents' custody pending the appeal. (A.

249, 251.) Petitioner was thereafter returned from the Juvenile Diagnostic Center and again imprisoned in the Fairfield County jail.

On December 22, 1966—after petitioner had spent a total of 78 days in solitary confinement in the jail—the District Court of Appeals held on the basis of its personal view of the premises that this was an illegal place of confinement for petitioner under Ohio law. It overruled the motion for bond or release to his parents, but ordered the Juvenile Court to make a custody order in conformity with law. (A. 253-254.) Petitioner was subsequently transferred to the detention facility of Franklin County.

On January 3, 1967, the District Court of Appeals affirmed the judgment of delinquency. The Court found "no violation of his constitutional rights and no error prejudicial to him. Neither do we find the Juvenile Code to be unconstitutional." (A. 271.) It overruled each of his constitutional claims, declaring it settled law in Ohio juvenile cases:

> "that the Fifth and Sixth amendments to the United States Constitution, being applicable only to the rights of accused persons charged with criminal offenses, do not apply." (A. 268.)

With respect to the burden of proof, the Court held that:

> "The proceeding being civil in nature and not criminal, a preponderance of the evidence is sufficient to warrant a determination that a minor is a delinquent, even though such determination involves a finding that a criminal statute has been violated by such minor." (A. 270.)

It further concluded that, under this standard of proof, the Juvenile Court judgment was not "against the manifest weight of the evidence." (A. 271.) But it also stated:

> *"The evidence contained in the record fails to disclose any thorough investigation by officials toward eliminating the possibility that Mrs. Gladys Willard may have been killed by some other person."* (A. 271.) (emphasis supplied)

Questions Presented

1. Was petitioner, a 14-year old boy, denied due process and equal protection in the proceedings which adjudicated him a delinquent, when: the sole basis for the judgment of delinquency was the charge that he had committed murder; the juvenile court found that there was "probable cause" that he "may have done this act;" and the state appellate court affirmed the judgment by applying as a standard of proof in his case the "preponderance of the evidence" test of ordinary civil cases?

2. (a) Was petitioner denied due process and equal protection, when: the juvenile court probation officer investigated the case, participated in the decision to file the delinquency charge against petitioner, and reported the results of his investigation *ex parte* to the juvenile court judge; and the same judge proceeded to issue a warrant for petitioner's arrest and to try the charge on the merits?

(b) In a delinquency proceeding based solely on a charge that a juvenile has committed a serious violation of state criminal law, in this case murder, may the accused juvenile constitutionally be denied trial by jury of the issue whether he committed the act charged?

3. Was petitioner denied due process by the admission into evidence of statements obtained from him under interrogation by law enforcement officials who did not warn him of his privilege against self-incrimination and right to counsel?

4. Was petitioner denied due process and equal protection when: the juvenile court refused to release him to the custody of his parents or on bond pending his adjudicative hearing, although he was charged with an offense bailable as of right for an adult and undisputed evidence showed that there was no significant risk of flight or danger to the community from his release; as a result of the refusal to release him, he was imprisoned for 27 days in solitary confinement in an adult jail prior to his adjudicative hearing; and he was thereafter subjected to further solitary confinement totaling 78 days until his imprisonment under these circumstances was held to violate state law by the court below?

Summary of Argument

I.

This was a juvenile delinquency proceeding based solely on the charge that petitioner had committed a serious violation of state criminal law, murder. He faced potential incarceration in a state institution as an adjudicated delinquent for up to seven years, as well as other serious sanctions and stigma.

The courts below applied constitutionally impermissible standards of proof in adjudicating him a delinquent. The juvenile court found that there was "probable cause" to

believe that he "may have done this act." The state appellate court affirmed the judgment by applying the "preponderance of the evidence" test of ordinary civil cases.

The "probable cause" test is not a standard for the determination of guilt and cannot support a delinquency adjudication. The "preponderance of the evidence" test applied below rested on the now discredited "'civil' label-of-convenience" for juvenile delinquency proceedings. This Court in *In re Gault*, 387 U.S. 1 (1967), rejected the "civil" label as a sufficient justification for denying juveniles rights accorded to adults.

The "preponderance" test is incompatible with the generally accepted principle that when personal liberty and reputation are at stake, the state must meet a higher standard of proof than that of ordinary civil cases. The trend of authority has turned against the "preponderance" test in delinquency cases based on serious violations of state criminal law. This test is also unfairly discriminatory against juveniles, since adults charged with offenses in both the adult and juvenile courts of Ohio must be proved guilty beyond a reasonable doubt.

The proper test in a case such as this one is proof beyond a reasonable doubt, or at the minimum, proof by "clear, unequivocal, and convincing" evidence. The "reasonable doubt" test is in accord with history and usage and is superior to all others in protecting against miscarriages of justice.

Under a constitutionally permissible standard of proof, the evidence in this case is insufficient to uphold the judgment below.

II.

A. Petitioner was denied a fair trial of the delinquency charge by an impartial trier of fact. The juvenile court judge participated personally and through his official arm, the probation officer, in the investigative and accusatory phase of the case and had *ex parte* access to the facts prior to the adjudicative stage.

The juvenile court probation officer investigated the case, reached the opinion that petitioner had committed the offense, participated in the decision to file the charge, reported the results of his investigation to the juvenile court judge *ex parte,* and testified against petitioner. The judge, after hearing the results of the investigation, issued a warrant for petitioner's arrest and proceeded to try the case on the merits.

These factors created a substantial danger of prejudgment by the judge as trier of fact and deprived the adjudicative hearing of both the substance and the appearance of fairness. Authoritative commentary in the juvenile court field is strongly opposed to the intermingling of functions and *ex parte* access to the facts in advance of adjudication such as occurred in this case.

B. In a delinquency proceeding based solely on a serious violation of state criminal law, an accused juvenile cannot constitutionally be denied trial by jury of the issue whether he committed the act charged. The reasons which have led to the establishment of trial by jury as the mode of trial in adult criminal cases are at least as compelling in delinquency cases based on serious law violation charges.

A jury as trier of fact is superior to a single judge in a case like the present, because the jury system assures application of a proper standard of proof, brings about due deliberation on the issues, guarantees individualized attention to each case and to the credibility of each witness, protects against official arbitrariness, and provides a means of implementing constitutional exclusionary rules of evidence without prejudicing the determination of the facts.

Jury trial will not impede the proper functioning of juvenile courts or interfere with their attainment of their legitimate objectives. Juvenile court judges have no expertness or special knowledge requiring that they be the sole triers of fact in the adjudicative stage of serious law violation cases. The desire for "informality" in juvenile proceedings cannot override the need to guarantee an accused juvenile a fair fact-finding procedure.

III.

Admission into evidence of petitioner's statements under interrogation violated his constitutional rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

The *Miranda* guarantees should be held applicable to official interrogation of juveniles suspected or accused of violations of state criminal law. *Gault* establishes that juveniles are entitled to the privilege against self-incrimination. The need to protect juveniles from abridgement of the privilege during pre-trial interrogation is far greater than in the case of adults. A juvenile as young as petitioner cannot be assumed to know his constitutional rights or how to assert them. The necessity for the *Miranda* guarantees is especially great, when, as here, the offense

is serious and the juvenile faces loss of his liberty for a substantial number of years. Current authority in the juvenile court field is overwhelmingly in favor of according the *Miranda* guarantees to juveniles suspected or accused of law violations.

On the facts of this case, the *Miranda* principles were violated. Petitioner was the prime suspect in the investigation. He was deprived of his freedom of action during the interrogation; the authorities were controlling all access to his home. He was interrogated by law enforcement officials who did not warn him of his privilege against self-incrimination and right to counsel.

His statements under interrogation should also have been excluded as involuntary under the circumstances of this case. He had just turned 14, had no previous contact with the law, was interrogated by a battery of principal law enforcement officials of his village and county, and was not warned of his constitutional rights. This interrogation was inherently coercive.

IV.

A. Petitioner was denied due process and equal protection when the juvenile court judge refused to release him to the custody of his parents or on bond pending his adjudicative hearing. Undisputed evidence showed that there was no significant danger of flight or danger to the community from his release. There was overwhelming and uncontradicted evidence of his good character and reputation in his community. His parents were willing to accept any condition imposed by the court to assure his appearance at trial.

He was charged with an offense, second degree murder, which was bailable as of right for an adult. Denial of release abridged the presumption of his innocence. As a result of its denial, he was imprisoned for 27 days prior to adjudicative hearing in solitary confinement in an adult penal institution, which was subsequently held by the state appellate court to be an unfit and illegal place of confinement for him.

Abuses of pre-hearing detention, of which this case is an aggravated example, are widespread in this country, according to recent studies. Many states have recognized either a right to bail for juveniles or its substantial equivalent in the form of a right to pre-hearing release under prescribed judicial standards and under appropriate conditions. Such a right should be declared as a matter of federal constitutional law for juveniles accused of law violations.

B. Petitioner was imprisoned in solitary confinement in an adult penal institution for 78 days during the juvenile proceedings, 27 of them prior to adjudicative hearing. This constituted the infliction of cruel and inhuman punishment, especially in view of the state's professed policy that juvenile delinquents should receive "treatment" and "rehabilitation."

This Court has characterized solitary confinement as cruel and unusual punishment even for convicted adult murderers. Petitioner, who had just turned 14, was subjected to such imprisonment for a substantial period both before and after adjudication, although under the state law he is not supposed to be a criminal but a person in need of "treatment." The proceedings against him should be in-

validated, in order to enforce the constitutional prohibition against cruel and unusual punishment.

The punishment of petitioner in this fashion also destroys any contention that denial of his procedural rights can be justified on the theory that the state gave him special consideration or treatment in return. Petitioner was denied basic constitutional rights of adults charged with crime and yet was treated far worse than an adult defendant would have been.

ARGUMENT

Introduction

This case raises important procedural questions relating to the conduct of juvenile delinquency proceedings, which were not explicitly resolved by this Court's decision last Term in *In re Gault*, 387 U.S. 1 (1967).

Two of these issues concern constitutional rights at the adjudicative stage of a delinquency proceeding:[12] whether a juvenile may be adjudicated a delinquent on a mere preponderance of the evidence and whether he has the right to a fair trial of the delinquency charge by an impartial trier of fact. The other issues relate to the pre-adjudicative stage of delinquency proceeding: whether a juvenile under interrogation by state officials is entitled to the constitutional guarantees established by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and whether he has a constitutionally protected right to release in appropriate circum-

[12] We here refer to and adopt the three-part analysis of the juvenile court process applied by this Court in *Gault*: pre-adjudicative; adjudicative; and dispositional. 387 U.S. at 13 and 31 n. 48.

stances and under appropriate conditions pending his adjudicative hearing. Finally, it presents the question whether a juvenile has a judicially enforceable constitutional right to be free from cruel and inhuman punishment by the state ostensibly acting in the role of *parens patriae*.

It is necessary at the outset to fix and delineate the context in which these issues arise in this case. This was a juvenile delinquency proceeding in which the sole basis for the adjudication of delinquency was the charge that petitioner committed an act which would be a serious crime if committed by a person over 18: murder in the second degree.[13] The delinquency adjudication rested entirely on this alleged law violation, under the Ohio juvenile code provision defining a "delinquent child" as one who "violates any law of this state . . . ."[14] There was no evidence on which a delinquency adjudication could have been made under any other provision of the Ohio juvenile code, and the District Court of Appeals so held. Indeed, the record affirmatively established that petitioner is of high moral character and reputation in his community. Thus the single issue presented for determination in the adjudicative stage of this case was the same as in any criminal case: did petitioner commit an act which the state has defined as a crime?

The charge of delinquency against petitioner—based on the allegation that he committed murder—carried potential consequences of enormous magnitude for him. The Ohio juvenile code authorizes drastic sanctions against an adjudicated delinquent, among them:

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[13] Ohio Rev. Code Ann. § 2901.05.

[14] *Id.* § 2151.02(A).

(a) Commitment to a state custodial institution which can last for the period of his minority, *i.e.*, until 21.[15]

(b) Certification of a delinquent "who has committed an act which could be a felony if committed by an adult" to the court of common pleas for trial as an adult.[16]

Thus petitioner faced in this proceeding the stigma of being labeled a murderer; the possibility of seven years incarceration in a state institution; and the further threat of certification for trial for murder as an adult after being found a delinquent.

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[15] Ohio Rev. Code Ann. § 2151.35(B), authorizes the juvenile court, upon a finding of delinquency, to:

> "Commit the child temporarily or permanently to the division of social administration of the department of public welfare, or to a county department of welfare which has assumed the administration of child welfare, county child welfare board, or certified organization, or to the youth commission or to a county or district training facility created under section 2151.65 of the Revised Code, or to any institution, or to any agency in Ohio or in another state authorized and qualified to provide or secure the care, treatment, or placement required in the particular case."

Commitments may continue until the juvenile is 21. Ohio Rev. Code Ann. §§ 2151.38, 5139.05(C). The youth commission may place him in an institution "under such condition as it deems best designed for the training and rehabilitation of the child and the protection to the public." *Id.* § 5139.06(A).

[16] *Id.* § 2151.26. In addition, so-called "incorrigible" juveniles over the age of 16 may be transferred administratively from a juvenile institution to the state reformatory, an adult penal institution. *Id.* § 5139.24. A male juvenile delinquent over 16 who has committed an act which if committed by an adult would be a felony may be committed by the juvenile court directly to the state reformatory. *Id.* § 2151.35(E). A male between 16 and 21 who is convicted of a felony as an adult is sentenced to the reformatory if he has not previously served a felony sentence, except that all males convicted of first or second degree murder go to the penitentiary. *Id.* § 5143.03.

As we shall demonstrate, despite these drastic consequences of the determination that he murdered Mrs. Willard, petitioner was denied procedural rights which have been deemed fundamental protections for persons charged with criminal offenses. As we shall also demonstrate, Ohio law is grossly disproportionate in its procedural treatment of juveniles and adults charged with identical conduct. Persons over 18 have all the rights for which we contend in Ohio adult courts; persons over 18 have these same rights in Ohio juvenile courts when tried for offenses in violation of the juvenile code;[17] but juveniles charged with delinquency—even when based solely on violation of a state criminal statute—are afforded none of these rights.

If petitioner had been one week over 18 instead of one week over 14 when this case arose, and had stood trial for murder in the second degree, he would have had the rights: (1) to require the State to prove every element of the offense beyond a reasonable doubt; (2) to a fair trial by an impartial trier of fact, including a jury if he so desired; (3) to exclusion from evidence of all statements obtained from him by state officials in disregard of the requirements of *Miranda* v. *Arizona, supra;* (4) to release on bail prior to trial; and to freedom from punishment of any kind in advance of conviction and from cruel and unusual punishment at any time. As this Court said in *Gault*:

> "So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliche can provide." 387 U.S. at 29-30.

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[17] Adults are tried in the Ohio juvenile courts for such offenses as contributing to the delinquency of a child, *id.* § 2151.41, and non-support of a child, *id.* § 2151.42.

It should be emphasized that we do not interpret this Court's decision in *Gault* as extinguishing all the distinctive features of juvenile court justice in this country or as requiring juvenile courts to become replicas of adult criminal courts. Nor do we make any such contentions in this case.

Gault pointed out unique aspects of the juvenile court system which it is important to preserve, such as "processing and treatment of juveniles separately from adults," avoiding classification of juveniles as "criminals," not imposing civil disabilities or disqualifications on delinquents, and maintaining confidentiality of juvenile court records and juvenile contacts with police. 387 U.S. at 22-25. None of these worthy features of the juvenile court system would be jeopardized in the least by recognition of the rights for which we contend in this case. Nor is the dispositional stage—potentially the most creative and flexible phase of the juvenile process for the achievement of the rehabilitative goals of the juvenile courts—involved in this case.

We also stress that cases like this—a delinquency proceeding based solely on an alleged act which would be a serious crime if committed by a person over 18, and carrying the threat of incarceration and other serious consequences for the juvenile—are a distinct minority of all juvenile contacts with the authorities. The National Crime Commission found that:

> "the informal and pre-judicial processes of adjustment compete in importance with the formal ones and account for a majority of juvenile dispositions." National Crime Commission, *The Challenge of Crime in*

a Free Society, p. 82 (1967) (hereinafter cited as *"National Crime Commission"*).[18]

Moreover, many other areas of juvenile court jurisdiction—even involving delinquency charges—are not based on alleged violations of state criminal laws. State juvenile court codes frequently confer jurisdiction over so-called "neglected" children,[19] "dependent" children,[20] children without "proper parental care,"[21] and other categories not involving alleged delinquency. Even under the rubric of delinquency, there are many categories which need not involve the violation of state criminal statutes, such as "incorrigibility,"[22] "habitual truancy,"[23] deporting oneself so "as to injure or endanger the morals or health of

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[18] "They include discretionary judgments of the police officer to ignore conduct or warn the child or refer him to other agencies; 'station adjustment' by the police, in which the child's release may be made conditional on his complying with designated limitations on his conduct; the planned diversion of alleged delinquents away from the court to resources within the school, clinic, or other community facilities, by such groups as mental health, social, and school guidance agencies; pre-judicial dispositions, at the intake stage of the court process, by probation officers or sometimes judges exercising a broad screening function and selecting among alternatives that include outright dismissal, referral to another community agency for service, informal supervision by the probation staff, detention, and filing a petition for further court action. In many courts the court intake process itself disposes of the majority of cases." *National Crime Commission*, p. 82.

[19] See Ohio Rev. Code Ann. § 2151.03.

[20] See *id.* § 2151.04.

[21] See *id.* § 2151.05.

[22] See *id.* § 2151.02(B).

[23] See *id.* § 2151.02(C).

himself or others,"[24] and others.[25] The rights for which we contend would have no necessary application to such cases.

Furthermore, recognition of the rights for which we contend would in no way impede—indeed it would enhance—the development of more flexible and informal techniques for handling and treating juveniles, not involving delinquency trials for law violations leading to possible incarceration. The National Crime Commission strenuously urged the development of such techniques, as this Court noted in *Gault*, 387 U.S. at 31 n. 48. The Commission called for "fullest feasible use of preliminary conferences to dispose of cases short of adjudication;"[26] employment of "consent decrees wherever possible to avoid adjudication while still settling juvenile cases and treating offenders;"[27] and continuing the movement for narrowing

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[24] See *id.* § 2151.02(D).

[25] It has been authoritatively estimated that over a quarter of that minority of all delinquency cases actually going to juvenile court for formal hearing involve charges not based on violations of state criminal laws. National Crime Commission, *Task Force Report: Juvenile Delinquency and Youth Crime*, p. 4 (1967) (hereinafter cited as *"Task Force"*).

[26] *National Crime Commission*, p. 84. Such conferences are statutorily provided for in New York and Illinois. See *Task Force*, p. 21; N.Y. Family Court Act § 734 (1962); Illinois Juvenile Court Act, Ill. Stat. Ann. Ch. 37, § 703-8 (Supp. 1966).

New Jersey, by rules promulgated by its Supreme Court, has recently differentiated delinquency cases into "formal" and "informal" calendars. The "formal" calendar contains those cases which, in the opinion of the juvenile court judge, "may result in the institutional commitment of the juvenile." New Rule 6:9-1(c) relating to procedure in the juvenile courts, effective September 11, 1967. The procedural requirements for the "formal" calendar are more stringent than those governing "informal" cases.

[27] *National Crime Commission*, p. 84. The consent decree procedure may enable the juvenile court judge to "short-circuit the more

juvenile court jurisdiction, to the end that juvenile courts should basically concern themselves with serious delinquency cases based on alleged violations of state criminal laws.[28] This case does not raise any procedural problems with respect to such informal techniques.

Like *Gault*, this case is concerned with the "precise impact" of due process and equal protection requirements in a "proceeding by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution." 387 U.S. at 13. We submit that, when the gulf between adult and juvenile proceedings is as wide as it is here with respect to basic fact-finding procedures in the adjudicative stage and with respect to such critical matters as pre-trial interrogation and pre-trial detention of an accused, the burden should be on the state to show an overriding interest in the denial to juveniles of procedural rights which would be accorded as of course to adults. If divergence on a particular procedure can be justified in terms of the distinctive objectives or resources of the juvenile courts, it should be for the state to demonstrate that justification for departing in juvenile cases from the historic content of due process of law. See generally Dorsen & Rezneck, *In re Gault and*

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rigorous procedural requirements [of the adjudicative stage] and continue to make use of the flexibility and other advantages of informality where he thought it desirable." *Task Force*, p. 40.

[28] *National Crime Commission*, p. 85. As this Court noted in *Gault*, 387 U.S. at 24 n. 31, the concept of "persons in need of supervision" is emerging as a means of overcoming the " 'invidious connotations' " of the term "delinquent." It provides a means for differentiating juveniles whose alleged misconduct does not involve violations of state criminal law from those who do. See New York Family Court Act § 712 (1962); Illinois Juvenile Court Act, Ill. Stat. Ann. Ch. 37, § 702-3 (Supp. 1966).

the Future of Juvenile Law, 1 Family L. Q., December, 1967, p. 1 (1967).

With this introduction as to the scope and dimensions of the issues posed by this case, we turn to set forth the specific denials of constitutional right suffered by petitioner.

I.

Petitioner Was Denied Due Process and Equal Protection by Reason of the Standard of Proof Applied by the Courts Below.

This Court in *Gault* manifested an overriding concern with the accuracy of the fact-finding process in the adjudicative phase of juvenile delinquency cases. The Court said:

> "Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy . . . the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data." 387 U.S. at 19-21.

This Court has recognized that the question of burden of proof—where it lies and how substantial it should be—

is critical to the determination of factual issues. In *Speiser* v. *Randall*, 357 U.S. 513, 520-521, 525-526 (1957), this Court said:

> "Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. *And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights.*"
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> * * * * *
>
> "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. [Citations omitted]. There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. *Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.*" (emphasis supplied)[29]

[29] Thus the Constitution also limits the powers of Congress and the states to create evidentiary presumptions and allow the prosecution thereby to discharge its burden of proof. *United States* v. *Romano*, 382 U.S. 136 (1965); *Tot* v. *United States*, 319 U.S. 463, 467, 469 (1943); *McFarland* v. *American Sugar Ref. Co.*, 241 U.S. 79, 86 (1916).

The question of the standard of proof in a juvenile delinquency hearing, which involves interests of "transcending value"—personal liberty and reputation—raises an issue of constitutional magnitude. We contend that the standard of proof applied by the courts below is incompatible with fair and reliable adjudication.

The standard of proof applied by the trier of fact below, the juvenile court judge, is glaringly at variance with established principles as to the evidence necessary for proof of guilt when personal liberty is in the balance. The juvenile court judge "found" that:

> "there has been a crime committed here, that there has been a homicide committed on this alleged victim; *and the Court finds that there is probable cause to believe that this young defendant may have done this act,* which, if done by an adult, would be a felony." (A. 240.) (emphasis supplied)

It is elementary that the "probable cause" standard has nothing to do with guilt; that it describes the quantum of evidence necessary to justify arrest, search, or detention for trial; and that it does not even amount to the "preponderance of evidence" necessary for proof of a fact in a civil case.

This Court made the distinction between "probable cause" and proof of guilt clear in *Brinegar* v. *United States,* 338 U.S. 160, 173, 174-175 (1949):

> "There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them."

* * * * *

"Guilt in a criminal cause must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act . . . ."

The distinction between "probable cause" and the quantum of evidence necessary for proof at trial is equally well-settled in non-criminal cases. Chief Justice Marshall said in *Locke* v. *United States,* 7 Cranch 339, 348 (1813), a condemnation action:

"[T]he term 'probable cause', according to its usual acceptation, means less than evidence which would justify condemnation . . . ."

Since the trier of fact in this case applied an impermissible standard of proof, the judgment against petitioner cannot stand, even if this Court were to give constitutional sanction to the "preponderance" test applied by the District Court of Appeals in holding that the judgment was "not against the manifest weight of the evidence." (A. 270-271.)

We contend, however, that the "preponderance" test applied by the District Court of Appeals is also inconsistent with constitutional standards of fair adjudication.

This "preponderance" test simply represented a mechanical carryover of the evidentiary standard applicable in the ordinary civil case, as the opinion of the District Court of Appeals makes clear. There was no recognition of how the interests of the juvenile at stake in this delinquency proceeding differed from the interests at issue in run-of-the-mill civil litigation. There was no independent consideration of the appropriate evidentiary standard in the light of those differing interests.

Thus the decision of the court below rests on an assumption which was exploded by this Court in *Gault*—that the denomination of a delinquency proceeding as "civil" validates the application of "civil" procedures and *per se* justifies the denial of procedural rights accorded as of course to adults in criminal trials. In holding the Fifth Amendment privilege against self-incrimination (and the Sixth Amendment right of confrontation and cross-examination) applicable in juvenile delinquency proceedings, this Court emphasized that for this purpose at least:

> "commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" 387 U.S. at 50.

To hold otherwise, this Court said, *"would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings." Id.* (emphasis supplied)

The court below relied on such a "label-of-convenience" in disposing of the question of the proper evidentiary

standard. It paid no attention to substance.[30] Other courts have not been so indifferent to the realities of the situation. Thus the Supreme Court of Virginia, in holding the reasonable doubt standard applicable in delinquency proceedings, has said:

> "The judgment against a youth that he is delinquent is a serious reflection upon his character and habits. The stain against him is not removed merely because the statute says no judgment in this particular proceeding shall be deemed a conviction for crime or so considered. The stigma of conviction will reflect upon him for life. It hurts his self-respect. It may, at some inopportune, unfortunate moment rear its ugly head to destroy his opportunity for advancement, and blast his ambition to build up a character and reputation entitling him to the esteem and respect of his fellow man . . . . Guilt should be proven by evidence which leaves no reasonable doubt." *Jones* v. *Commonwealth*, 185 Va. 335, 341-342, 38 S.E.2d 444, 447 (1946).

The Supreme Court of Illinois, where the juvenile court movement in this country began, recently held the rea-

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[30] In *State* v. *Shardell*, 107 Ohio App. 338, 153 N.E.2d 510 (1958), relied on by the court below for the proposition that the civil standard should apply in juvenile proceedings, the court said:

> "It is an informal hearing through the medium of juvenile Court to determine whether the child needs the intervention of the state as guardian and protector of his person. *This is obviously to do away with the usual and customary ceremony and procedure of a court trial in order to surround the child with an atmosphere of friendliness and goodwill rather than one of hostility and fault-finding.*" 107 Ohio App. at 340-341, 153 N.E.2d at 512 (emphasis supplied).

In the light of what has happened to petitioner in this case, such an analysis of the impact of a juvenile delinquency proceeding is totally lacking in realism.

sonable doubt standard applicable in a law violation case, stating:

> "When we eschew legal fictions and adopt a realistic view of the consequences that attach to a determination of delinquency and a commitment to a juvenile detention home, 'juvenile quarters' in a jail or a State institution as described above, we can neither truthfully nor fairly say that such an institution is devoid of penal characteristics. Though the purpose of industrial training schools for boys, such as that at St. Charles in Illinois, is to rehabilitate and train youths whose misconduct has brought them to these institutions, the incarcerated juveniles' liberty of action is restrained just as effectively as that of the adult inmates serving terms in State and Federal prisons". *In re Urbasek,* —— Ill. 2d ——, —— N.E.2d —— (1967).

The requirement of a higher standard of proof when liberty and reputation are jeopardized is long-standing and is generally recognized in our law. Thus McCormick states:

> "The consequences to the life, liberty and good name of the accused from a conviction of crime may be much more serious than the effects of a judgment in a civil case. Accordingly, it is just and reasonable to require a greater degree of confidence by the trier in the truth of the charge in a criminal than in a civil case. This demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times . . . ." McCormick, *Evidence,* § 321, p. 681.

As Professor Goldstein has analyzed the concepts of "presumption of innocence" and proof "beyond a reasonable doubt":

> "[they] symbolize today, as they did in their beginning, the special place of the accused in our system of criminal procedure. They cast in evocative language the deeply-held feeling that the combination of all-too-fallible witnesses and serious sanctions requires that the sanctions should be imposed only when guilt seems virtually certain . . . the serious nature of the criminal sanction would seem to be ample reason for insisting upon standards of proof more rigorous than those which prevail in civil cases." Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L. J. 1149, 1153, 1162 (1960).

The same recognition of the need to safeguard the adjudicative process when vital personal interests are affected underlies this Court's line of decisions on the standard of proof in denaturalization, expatriation, and deportation cases. Only last Term, this Court held that the burden on the Government in a deportation case is to establish the facts by no less than "clear, unequivocal, and convincing evidence." *Woodby* v. *Immigration Service*, 385 U.S. 276, 286 (1966).[31]

In words precisely applicable to the present case, this Court rejected the Government's contention that because deportation is not criminal, the appropriate burden is the "preponderance" test of civil cases. Mr. Justice Stewart said for the Court:

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[31] This test had previously been applied in denaturalization and expatriation cases. See 385 U.S. at 285 nn. 16 and 17, and cases therein cited.

> *"To be sure, a deportation proceeding is not a criminal proceeding.* [citation omitted] *But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case."* 385 U.S. at 285. (emphasis supplied)

It also does not syllogistically follow from the label attached to a delinquency proceeding that a juvenile may be incarcerated for up to seven years and subjected to other serious sanctions on "no higher degree of proof than applies in a negligence case."

The trend of authoritative commentary on the juvenile court system has turned decisively against the "preponderance" test.[32] The Children's Bureau of the Department of

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[32] The "preponderance" test has been termed the majority position, Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice,* 79 Harv. L. Rev. 775, 795 (1966) (hereinafter cited as "Harvard Law Review Note"). But the courts adopting it have generally relied on the now discredited "'civil' label-of-convenience" to justify it.

Moreover, even in states which have formally adhered to the "preponderance" test, individual juvenile court judges have exercised the power to require a higher standard of proof of delinquency. See Comment, *Criminal Offenders in the Juvenile Court: Some Brickbats and Another Proposal,* 114 U. Pa. L. Rev. 1171, 1194 (1966) (hereinafter cited as "Pennsylvania Law Review Comment"); Rubin & Shaffer, *Constitutional Protections for the Juvenile,* 44 Denver L. J. 66, 70 (1967).

This trend began early in the juvenile court movement:

> "When delinquency cases are heard in non-criminal courts, I suppose the true rule to be preponderance of evidence. But here I, at least, must plead guilty to judicial legislation, and I suspect I am not alone in this. When we have minimized the stigma of an adjudication of delinquency in every way that kindly ingenuity may devise, it remains true that in the mind of the child, his family and his acquaintances who know about it, it is practically equivalent to conviction of a criminal of-

Health, Education, & Welfare rejects it in favor of the adoption of a requirement of "clear and convincing" proof.[33]

The framers of the current proposal for a Uniform Juvenile Court Act, prepared in the light of *Gault*, state:

> "A child should not be deprived of his liberty, nor his parents deprived of his custody, based only on 'a preponderance of the evidence.'" National Conference of Commissioners on Uniform State Laws, Second Tentative Draft, Uniform Juvenile Court Act, p. 34 (1967).

Recently the Supreme Court of New Jersey adopted new rules for the conduct of juvenile delinquency proceedings, providing that an adjudication of delinquency must be based on evidence beyond a reasonable doubt. New Rule 6.9-1(f) relating to juvenile court procedure, effective September 11, 1967.

The Illinois Supreme Court, in holding unconstitutional the Illinois statutory incorporation of the "preponderance" test, stated:

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fense. In the face of this fact legal theory should give way, and no less evidence should be required than if the hearing were a criminal trial. In the rare instances when I have juries in the juvenile court, I instruct them to this effect, and I apply the same test to my own mind in reaching judicial conclusions." Waite, *How Far Can Court Procedure Be Socialized Without Impairing Individual Rights*, 12 J. Crim. L.C. & P.S. 339, 344 (1922).

[33] Children's Bureau, HEW, *Standards for Juvenile and Family Courts*, p. 72 (1966) (hereinafter cited as *"Standards"*). "Clear and convincing proof is the highest order of civil evidence, which admits of only one reasonable conclusion." Vinter, *The Juvenile Court as an Institution, Task Force*, 84, 103 (1967). It will be recalled that the Supreme Court of Arizona in *Gault* adopted this standard of "clear and convincing evidence." See 387 U.S. at 11.

"We need not be reminded that the *Gault* decision did not pass upon the precise question of the quantum of proof that must be shown to validate a finding of delinquency. We believe, however, that the language of that opinion exhibits a spirit that transcends the specific issues there involved, and that, in view thereof, it would not be consonant with due process or equal protection to grant allegedly delinquent juveniles the same procedural rights that protect adults charged with crimes, while depriving these rights of their full efficacy by allowing a finding of delinquency upon a lesser standard of proof than that required to sustain a criminal conviction. Since the same or even greater curtailment of freedom may attach to a finding of delinquency than results from a criminal conviction, we cannot say that it is constitutionally permissible to deprive the minor of the benefit of the standard of proof distilled by centuries of experience as a safeguard for adults." *In re Urbasek, supra,* —— Ill. 2d at ——, —— N.E.2d at ——.

The Illinois court also emphasized that:

"The unique benefits that are derived from the special dispositional processes under the Act will not be diluted by the changes made here at the adjudicatory stage. Moreover, we do not suggest that any infirmity exists in the provisions of the Act relating to dependent and neglected minors because the circumstances of such youths differ substantially from those of delinquent minors whose own culpable acts cause them to be deprived of their parental home and natural liberty in appropriate cases. . . . Because of

> these differences we see no compelling reason for requiring more than a preponderance of the evidence standard of proof in cases of dependency or neglect which may appropriately be labelled 'civil' proceedings both in the legal and lay sense of the word." —— Ill. 2d at ——, —— N.E.2d at ——.

The arbitrariness and unfairness of the "preponderance" test as applied by the court below are heightened by comparing it with the standard of proof for adults accused of crimes in both the adult and juvenile courts of Ohio. Ohio law provides that in the court of common pleas, which tries felonies:

> "A defendant in a criminal action is presumed to be innocent until he is proved guilty of the crime charged, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he shall be acquitted. This presumption of innocence places upon the state the burden of proving him guilty beyond reasonable doubt." [34]

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[34] Ohio Rev. Code Ann. § 2945.04. The statute proceeds to define reasonable doubt as follows:

> " 'It is not a mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.'
>
> In charging a jury the trial court shall state the meaning of presumption of innocence, and read said definition of reasonable doubt."

This definition is substantially that of Chief Justice Shaw in *Commonwealth* v. *Webster*, 5 Cush. 295, 320 (Mass. 1850).

The presumption of innocence and the requirement of proof beyond a reasonable doubt are also applicable in magistrate's courts trying misdemeanors, violations of ordinances, violations of penal regulations, and complaints to keep the peace. *Id.* § 2938.08.

Likewise, the requirement of proof of each element of the offense beyond a reasonable doubt applies in trials of adults in the juvenile courts. In fact, with respect to the trial of an adult in the juvenile court for the misdemeanor of contributing to the delinquency of a minor, the Supreme Court of Ohio has held that:

> "It is essential, in order to sustain a conviction, to establish by evidence beyond a reasonable doubt that there was some delinquency of such child which defendant either aided, abetted, induced, caused or to which he contributed." *State* v. *Miclau,* 167 Ohio St. 38, 146 N.E.2d 293, 294 (1957).[35]

Moreover, in a variety of civil cases, the courts of Ohio apply a higher standard of proof than the "preponderance" test. For example, it has been held that there is a presumption of the legitimacy of a child which is rebuttable only by "clear and convincing evidence." *State* v. *Carter,* 175 Ohio St. 98, 100, 191 N.E.2d 541, 543 (1963). It is astounding that if the State, or a private party, were attempting to prove that petitioner was illegitimate in a case affecting his property rights, a higher standard of proof would be imposed than in a delinquency proceeding which can take away his liberty and destroy his reputation.[36]

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[35] Thus, paradoxically, if a juvenile and an adult were tried for delinquency and contributing to delinquency respectively, based on the same conduct of the juvenile, the juvenile could be adjudicated a delinquent by a preponderance of the evidence of the alleged delinquent act, whereas the same act would have to be proved beyond a reasonable doubt to convict the adult.

The requirement of proof beyond a reasonable doubt also applies to the trial of an adult in the juvenile court for the misdemeanor of nonsupport. *State* v. *Carter,* 175 Ohio St. 98, 191 N.E.2d 541 (1963).

[36] "Clear and convincing" evidence is also necessary in Ohio to support a gift *causa mortis, Adams* v. *Fleck,* 171 Ohio St. 451, 455,

In the light of these factors, the "preponderance" test, as applied in this case, should be held to be a denial of due process and equal protection.

As the proper test in a law violation case with the serious potential consequences of this one, we believe that proof of the violation beyond a reasonable doubt should be required. At the minimum, the violation should be proved by no less than the "clear, unequivocal, and convincing" evidence which the Government must present in deportation, denaturalization, and expatriation cases. See *Woodby* v. *Immigration Service, supra.*[37]

The "reasonable doubt" standard is supported by the weight of history and of universal usage in the United States. Mr. Justice Frankfurter has said:

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172 N.E.2d 126, 129 (1961); to disprove the authenticity of a signature on a summons in a civil case, *Sjogren* v. *Sjogren,* 77 N.E.2d 739 (Ohio App. 1946); and to prove a commonlaw marriage, *Brastein* v. *Sedivy,* 153 N.E.2d 541 (Ohio Prob. Ct. 1957).

As this Court noted in *Woodby* v. *Immigration Service, supra,* this standard of proof "is no stranger to the civil law; and it, or even a higher one," "has traditionally been imposed in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases involving such issues as adultery, illegitimacy of a child born in wedlock, lost wills, oral contracts to make bequests, and the like." 385 U.S. at 285 and n. 18. See 9 Wigmore, *Evidence,* § 2498 (3d ed. 1940).

[37] We do not regard the latter test as significantly different from the "reasonable doubt" test. The Court in *Schneiderman* v. *United States,* 320 U.S. 118, 135 (1943), a denaturalization case, referred to "'clear, unequivocal, and convincing' evidence *which does not leave the issue in doubt.*" (emphasis supplied) In *Baumgartner* v. *United States,* 322 U.S. 665, 670 (1944), another denaturalization case, the Court formulated the standard as "that solidity of proof *which leaves no troubling doubt* in deciding a question of such gravity. . . ." (emphasis supplied) What matters, we submit, is not so much the precise verbal formula but that the standard of proof shall be substantially higher in a case like this than in an ordinary civil case.

"It is the duty of the Government to establish [an accused's] guilt beyond a reasonable doubt. This notion —basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural context of 'due process.'" *Leland* v. *Oregon*, 343 U.S. 790, 802-803 (1952) (dissenting opinion of Frankfurter and Black, JJ.)[38]

The "reasonable doubt" standard is clearly superior to all others in protecting against miscarriages of justice and in helping to assure that no man—or boy—should suffer for an offense he did not commit. It has been said:

"It is well to remember a major point about the legal requirement that for conviction there be proof beyond a reasonable doubt: it is the normative or value judgment expressed in this requirement. It is a way of saying that we live in a society that prefers to let ten guilty men go free rather than risk convicting one innocent man. This is, to be sure, an almost heroic commitment to decency." Kalven & Zeisel, *The American Jury*, p. 189 (1966).

There is no reason why the "commitment to decency" of the juvenile courts should be less than that of adult courts. Or to put the point another way: there are no discernible

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[38] The earliest recorded crystallization of the "reasonable doubt" formulation appears to have been in 1798, in a treason trial in Ireland, but it was already regarded as a settled principle of law. See McCormick, *Evidence*, § 321, pp. 681-682.

"It is now accepted in commonlaw jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." *Id.* See also 9 Wigmore, *Evidence*, § 2497, pp. 318-320.

institutional interests or distinctive objectives of the juvenile court system which justify a lower standard of proof for a juvenile accused of a law violation than would prevail for an adult accused of the same violation. It cannot be seriously contended that the need to suppress juvenile delinquency is so much greater than the need to suppress adult crime that society can afford to take greater risks with the fact-finding process in juvenile courts than it would in adult trials.

Moreover, the risks of unjust and inaccurate findings of fact are at least as substantial in juvenile as in adult courts because of the practice of many juvenile courts to operate under relaxed rules of evidence. See *In re Gault*, 387 U.S. at 11 n.7. The record in the present case, for example, is spattered with hearsay at several important points. (See, *e.g.*, A. 210-211.) The danger that a lower standard of proof may lead to an unjust adjudication in the juvenile court is not illusory. The District Court of Appeals conceded the reality of the spectre in this very case when it stated:

> *"The evidence contained in the record fails to disclose any thorough investigation by officials toward eliminating the possibility that Mrs. Gladys Willard may have been killed by some other person."* (A. 271.) (emphasis supplied)

This statement by the court below—which was obviously considered with care—points up another office of the "reasonable doubt" standard. It makes the investigating authorities do their job and prepare their case properly. There is surely no institutional reason why sloppiness and negligence in the preparation and presentation of a law

violation case are tolerable in the juvenile court system but not in the adult courts. If a law enforcement official knows that he must meet the higher standard of proof, he must be more efficient in seeking out evidence and establishing guilt. All innocent persons are thereby rendered more secure.[38a]

Furthermore, the "reasonable doubt" standard is superior to all others in bringing home forcefully to the trier of fact, whether court or jury, that it must reach a state of belief as to where the truth lies; the "preponderance" test is especially dangerous in its tendency to lead the trier of fact into a merely abstract weighing of the quantity of evidence produced by each side, without regard to its actual probative effect in convincing him of the truth of disputed facts. As McCormick puts this point:

> "It will be noted that the 'reasonable doubt' formula points to what we are really concerned with, the state of the jury's mind, whereas the other two ['clear, strong and convincing' and 'preponderance'] divert attention to the evidence, which is a step removed, being the instrument by which the jury's mind is influenced. These latter phrases, consequently, are awkward vehicles for expressing the degree of the jury's belief." McCormick, *Evidence*, § 319, p. 676.[39]

[38a] This would work no hardship on law enforcement officials in a serious law violation case involving a juvenile. Since certification of the juvenile for trial as an adult is always a possibility in such a case, elementary prudence should lead the authorities to investigate and prepare such cases on the assumption that they must meet the "reasonable doubt" standard of proof anyway. See Children's Bureau, HEW, *Police Work with Children*, p. 37 (1962).

[39] See also James, *Civil Procedure*, § 7.6, pp. 250-251. It has been pointed out that the "reasonable doubt" standard has the further advantage of being a term in common use, readily under-

Finally, the "reasonable doubt" standard is also readily separable from other trial procedures. If such noncriminal features as more relaxed rules of evidence and trial by the court rather than a jury are retained by juvenile courts, the application of a stricter standard of proof is in no way inconsistent with them. Indeed, if such features are constitutionally permissible, they make all the more urgent a strict standard of proof to guard against injustice.[40]

If we are correct that the courts below applied constitutionally impermissible standards of proof, we contend that under a permissible standard—whether "reasonable doubt" or some substantially equivalent formulation—the evidence against petitioner is constitutionally insufficient to uphold the judgment below. That this Court is empowered to make its own evaluation of the record and arrive at such a determination is established by *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 264-265, 285 (1964), in which the Court said:

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stood by jurors, lawyers, and judges alike. McCormick, *Evidence*, § 321, p. 682. The "preponderance" test is considered one of the most widely misunderstood and difficult to explain in the law of evidence. See McBaine, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242, 251 (1944).

[40] For other authorities urging the "reasonable doubt" test in delinquency cases, see Goldberg & Sheridan, *Family Courts—An Urgent Need*, Children's Bureau, HEW, Publication No. 6-1960, pp. 12-13; Pennsylvania Law Review Comment, p. 1195; Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L. Q. 387, 412 (1961); Rappeport, *Determination of Delinquency in the Juvenile Court: A Suggested Approach*, 1958 Wash. U. L. Q. 123, 149-156; Boches, *Juvenile Justice in California: A Re-evaluation*, 19 Hastings L. J. 47, 92 (1967); Rubin, *Constitutional Rights in Juvenile Court*, 16 Clev.-Mar. L. Rev. 477, 483 (1967).

The practice in the children's courts of England is to require the criminal standard of proof. Fitzgerald, *Child, White Paper and Criminal Law*, 1966 Crim. L. Rev. 607, 611.

> "We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent."
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> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." [41]

Actually, detailed analysis of the record is hardly necessary in view of the statement by the District Court of Appeals that:

> "The evidence contained in the record fails to disclose any thorough investigation by officials toward eliminating the possibility that Mrs. Gladys Willard may have been killed by some other person." (A. 271.)

It is clear from this statement that the State did not prove beyond a reasonable doubt or by clear, unequivocal, and convincing evidence that petitioner murdered Mrs. Willard. The court below affirmed the judgment only by applying the bare "preponderance" test of the civil law; even then it found only that the judgment was not "against the manifest weight of the evidence." (A. 271.)

The case against petitioner was full of holes. All that the State really had to rely on was the discovery of the body under his bed—but without any showing that he had exclusive control of the premises or was home throughout

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[41] See also *Beckley Newspapers Corp.* v. *Hanks*, No. 467, O.T. 1967, *cert. granted and judgment reversed per curiam*, Nov. 6, 1967, 36 U.S.L.W. 3188; *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944); *Mortensen* v. *United States*, 322 U.S. 369, 374 (1944).

the time when the body could have been placed there. The time of Mrs. Willard's death, the place of her death, petitioner's whereabouts during the day, her whereabouts during the day—all were left uncertain.[42] Petitioner had no motive to kill her, betrayed no consciousness of guilt, and was shown to be of high moral character and reputation. A prime suspect—her husband—emerged clearly from the record. He had both the motive and the opportunity to commit the murder. He even went so far as to admit on cross-examination his presence near the scene at about the time the State sought to show that Mrs. Willard had died.

On this evidence, no one could conclude that petitioner's commission of the murder was proved with any degree of clarity or certainty, much less beyond a reasonable doubt. To adjudge a person—man or boy—a murderer on this evidence is a denial of due process of law. *Cf. Thompson* v. *City of Louisville*, 362 U.S. 199 (1960).[43]

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[42] Petitioner's statements to the officials who interrogated him—even if they were admissible, which we deny—were not reduced to writing; were ambiguous and unclear as to his and Mrs. Willard's whereabouts during the day; at most showed that he saw Mrs. Willard on the day she died, as did a number of other people; and did not establish either that he must have been the last person to see her alive or that he must have been in the house when her body was placed under his bed. Chief Phillips' hearsay testimony about the investigation he conducted and the people he talked to was lacking in probative value, and the definitive evaluation of his investigation has already been given by the District Court of Appeals in the passage we have quoted.

[43] The appropriate disposition of this case in the state court on reversal and remand should therefore be a final judgment for petitioner.

II.

Petitioner Was Denied Due Process and Equal Protection Because He Was Not Afforded a Fair Trial by an Impartial Trier of Fact.

A. The record establishes that the trier of fact, the juvenile court judge, participated—personally and through his official arm, the probation officer—in the investigative and accusatory process in this case and that he had *ex parte* access to the facts prior to the adjudicative stage. Either of these factors is sufficient to invalidate his judgment under familiar principles of law.

A fair trial by an impartial trier of fact is one of the essential elements of due process of law in any case, criminal or civil, in any court, state or federal. This Court expressed the governing principles in *In re Murchison*, 349 U.S. 133, 136 (1955), in this fashion:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' [Citation omitted]. Such a

and ordering petitioner's arrest, the court found at the conclusion of the hearing that there was "probable cause to believe that this young defendant may have done this act." (A. 240.) The court was simply reaffirming the judgment which it must have reached in advance of the hearing in order to issue the warrant for petitioner's arrest.

Moreover, the relationship between the court and its probation officer, as provided for by the Ohio juvenile code and as exhibited in this record, is inherently prejudicial to fair and impartial judgment by the court. The Ohio code mandates that the probation department:

> "shall make such investigations as the juvenile court directs, keep a written record of such investigation, and submit the same to the judge or deal with them as he directs." Ohio Rev. Code Ann. § 2151.14.

Here the court's probation officer investigated the crime; joined in the interrogation of petitioner and accused him of committing the murder; told the Prosecuting Attorney that he felt that petitioner had participated in the crime; joined with the Prosecuting Attorney and the police chief in the decision to file a complaint against petitioner; was directed by the judge to arrest petitioner;[45] and then testified against him at the adjudicative hearing before the same judge.

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[45] A probation officer in Ohio is authorized to serve process, make arrests, detain arrested persons, "and perform such other duties, incident to his office, as the judge directs." Ohio Rev. Code Ann. § 2151.14.

He is appointed by the juvenile court judge, his compensation is fixed by the judge, and he serves at the judge's pleasure. *Id.* § 2151.13.

This placed the juvenile court in the position of actively participating through its own official arm in the investigative and accusatory phase of these proceedings and then sitting in judgment on what its official arm had done, even to the point of passing on the credibility of its probation officer as a witness.

Authoritative commentators have warned against this mingling of functions which should be kept separate for the sake of fair adjudication. The Children's Bureau states:

> "It seems clear that investigation, as defined here, and the initiating of a petition are not appropriate functions of the court. *A court through the use of its own staff should not be placed in the position of investigator and petitioner and also act as the tribunal deciding the validity of the allegations in the petition. . . .*" *Standards*, p. 13. (emphasis supplied).[46]

The proposed Uniform Juvenile Court Act provides:

> "the judge . . . if he approves the filing of the petition shall not hear or dispose of matters thereafter arising in the case." National Conference of Commissioners

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[46] The kind of activity by the probation officer shown in this record is not consistent with the proper attainment by the juvenile court of its rehabilitative purposes:

> "placing responsibility on the probation officer for investigating the act, filing the petition, and supporting the petition with the necessary evidence in court may in fact place him in an adversary position in the eyes of the child and family. The doubt and distrust thereby aroused in the minds of the child and parents hinders the development of the helping relationship which must be established if treatment is to be effective. . . . The functions of the law enforcement officer and those of the probation officer are incompatible when vested in the same individual." *Standards*, pp. 55, 107.

on Uniform State Laws, Second Tentative Draft, Uniform Juvenile Court Act, Section 14, pp. 18-19 (1967).

Its framers state that judicial approval of the filing of a petition "is open to serious objection for it puts the judge in the untenable position of hearing a charge which he has approved," citing *Murchison*. *Id.*, Comment to Section 14, p. 19. See also Boches, *Juvenile Justice in California: A Re-evaluation*, 19 Hastings L. J. 47, 67, 94 (1967).

The juvenile court's *ex parte* access to the investigation of the crime in advance of adjudication is an additional reason why the proceedings below denied petitioner his right to a fair and impartial trial. This Court has held that the trier of fact must not be afforded *ex parte* access to facts about the case. *Parker* v. *Gladden*, 385 U.S. 363 (1966).

As was said in *Turner* v. *Louisiana*, 379 U.S. 466, 472-473 (1965):

> "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

This Court held in *Kent* v. *United States*, 383 U.S. 541, 563 (1966), that a juvenile court judge "*may not*, for purposes of a decision on waiver, *receive or rely upon secret information, whether emanating from his staff or otherwise.*" (emphasis supplied) Juvenile courts are "governed in this respect by established principles controlling courts and quasi-judicial agencies." *Id.*

It follows that, in an adjudicative hearing to determine delinquency, the juvenile court judge may not receive or rely on information communicated *ex parte,* by his probation officer or anyone else. It is clear from this record that information about this case was communicated to the court by the probation officer in advance of adjudicative hearing. The only point left uncertain is the extent and detail of the information communicated. In view of the juvenile court's foreclosure of further inquiry into the extent of this *ex parte* communication (see A. 122-123), any uncertainty on this point should not operate to petitioner's detriment: "the ordinary rule, based on considerations of fairness, does not place the burden on a litigant of establishing facts peculiarly within the knowledge of his adversary." *Campbell* v. *United States,* 365 U.S. 85, 96 (1961).[47]

Many authorities in the juvenile court field have emphasized the threat to fair adjudication posed by *ex parte* access to facts about the case by the trier of fact in advance of adjudication. See, *e.g., Standards,* p. 73; *Task Force,* p. 35; Vinter, *supra, Task Force,* p. 88; Note, *Rights and Rehabilitation in the Juvenile Courts,* 67 Col. L. Rev. 281, 308 (1967) (hereinafter cited as "Columbia Law Review Note").

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[47] In *Commonwealth* v. *Johnson,* 348 Penn. 349, 35 A.2d 312 (1944), the Court reversed a murder conviction entered in a non-jury trial because the court communicated with officials of the penitentiary where the defendant was confined before returning the verdict. The Court said:

> "We are reversing the judgment because the record does not show affirmatively that no *ex parte* evidence was received by the court before it determined and declared the degree of the defendant's guilt. . . . " 348 Penn. at 353, 35 A.2d at 314.

Such *ex parte* access in advance of adjudication, in addition to denying the juvenile's rights of confrontation, cross-examination, and the assistance of counsel, all recognized in *Gault*, greatly increases the dangers of prejudgment by the trier of fact. These dangers were at their maximum here because of the role of the juvenile court judge and his probation officer in the investigatory and accusatory phases. As was said in *In re Murchison, supra*, "As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session." 349 U.S. at 138.[48]

The foregoing considerations require reversal of the judgment against petitioner.

B. The court below also addressed itself to the right of jury trial in juvenile cases and held that the Ohio juvenile code validly denies jury trial to alleged delinquents, on the ground that "the Fifth and Sixth Amendments to the United States Constitution, being applicable only to the rights of accused persons charged with criminal offenses, do not apply." (A. 268.)

We contend that petitioner had a constitutional right to a trial by an independent and impartial trier of fact—a jury if he so desired—of the issue whether he murdered

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[48] The court's predisposition to find guilt is further shown by its denial of pre-hearing release to petitioner in the face of an overwhelming record in support of the motion for release, as we discuss in Point IV, *infra*.

If more evidence of prejudgment in this case is needed, we need only point to repeated manifestations of hostility by the judge to the defense, such as his suggestion that motions challenging the proceedings on constitutional grounds were "delaying tactics" (A. 115); his statement in response to a defense proffer at one point that "You can proffer the City Hall, but it's incompetent" (A. 180); and other comments by the court. (A. 106-108, 112-113.)

Mrs. Willard. The Ohio juvenile code, providing that "the court shall hear and determine all cases of children without a jury,"[49] cannot constitutionally be applied to deny jury trial in a serious law violation case like the present.

The history of trial by jury in Anglo-American law; its central position in our system of criminal procedure; and the deeply held postulates of our society about the guilt-determining process expressed in trial by jury, are all too familiar to this Court to require elaborate treatment here.[50] We will address ourselves to the specific application of the jury trial right to juvenile proceedings, contending that the considerations justifying it in adult cases are at least as compelling in juvenile delinquency cases based on serious law violation charges and that its recognition in such cases would in no way impair the performance by the juvenile courts of their proper function.

First, it should be pointed out that the court below, in holding jury trial inapplicable, relied on the same "'civil' label-of-convenience" that it did with respect to the standard of proof. That formula for determining procedural issues in juvenile cases was discredited in *Gault*, as was also the sweeping conclusion of the court below that the Fifth and Sixth Amendments to the Federal Constitution do not apply in juvenile courts: *Gault* held rights guaranteed in both Amendments to be applicable in a delinquency proceeding under the Fourteenth Amendment. Thus

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[49] Ohio Rev. Code Ann. § 2151.35.

[50] For an exhaustive consideration of trial by jury, establishing that it is "so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment", *Washington* v. *Texas*, 388 U.S. 14, 17-18 (1967), we respectfully refer this Court to the Brief for Appellant in *Duncan* v. *State of Louisiana*, No. 410, O.T. 1967.

the question of jury trial cannot be resolved on so simplistic a basis.

The right of jury trial, like the rights held applicable in *Gault,* must be evaluated in light of the realities of the juvenile court system, the substance of the issues being adjudicated in the delinquency proceeding, and the potential consequences of a delinquency adjudication. This Court's statement in *District of Columbia* v. *Clawans,* 300 U.S. 617, 627 (1937), is pertinent in this respect:

> "We are aware that those standards of action and of policy which find expression in the common and statute law may vary from generation to generation. Such change has led to the abandonment of the lash and the stocks, and we may assume, for present purposes, that commonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribes, in some cases which were triable without a jury when the Constitution was adopted."

A jury is a superior trier of fact in a law violation case like the present one. The adjudicative hearing was simply a trial of the issue: did petitioner murder Mrs. Willard? Every state in the Union would have given petitioner a right of jury trial in such a case if he had been an adult. See *Turner* v. *Louisiana,* 379 U.S. 466, 471 n. 9 (1965). It presented a classic jury issue, literally a "who-dun-it," the very kind of case of which Chief Justice Cooley wrote:

> "The law has established this tribunal because it believed that, from its numbers, the mode of their

> selection, and the fact that the jurors came from all classes of society, *they are better calculated to judge motives* [*and*] *weigh possibilities . . . than any single man; however pure, wise and eminent he may be.* This is the theory of the law; and as applied to criminal accusations, it is eminently wise and favorable alike to liberty and justice." *People* v. *Garbutt,* 17 Mich. 9, 27 (1868). (emphasis supplied)

Nothing in the trial of this case called for the application of any special expertness in determining delinquency possessed by the juvenile court judge.[51] There was no issue requiring the making of a judgment or application of a standard peculiar to the juvenile court system, such as "incorrigibility" or "habitual truancy," in which a juvenile court judge might bring special knowledge or familiarity to the adjudicative phase. Empirical studies have failed to demonstrate that judges have any special competence denied to jurors in finding the facts as to alleged law violations. Instead they have reinforced the views of practicing trial lawyers that the jury is a reliable fact-finding body. See, *e.g., Kalven & Zeisel, supra,* pp. 149-162.

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[51] If juvenile court judges can be presumed to have special knowledge or expertness, it would not be in the adjudicative stage, but in the determination of how best to treat an adjudicated delinquent in the dispositional stage. See Pennsylvania Law Review Comment, pp. 1218-19.

Compare this Court's comment in *Gault,* 387 U.S. at 14 n. 14, that as of 1964, less than 10% of juvenile court judges were full-time; a fifth were not members of the bar; a quarter had no law school training; and three-quarters devoted less than a quarter of their time to juvenile matters. "It has been observed that while 'good will, compassion, and similar virtues are . . . admirably prevalent throughout the system . . . expertise, the keystone of the whole venture, is lacking.'" *Id.* (Citing Harvard Law Review Note, p. 809.)

The superiority of jury trial purely from the standpoint of fact-finding is reinforced if a higher standard of proof is to be required in juvenile cases, as we contend in Point I. The jury is constituted as a deliberative body. If the proof of a law violation must be beyond a reasonable doubt, or at least by "clear, unequivocal, and convincing evidence," the deliberative process of the jury is a better means of assuring that the proper standard is adhered to. There is always the danger that a single judge will apply the higher standard in form, but a lesser in actuality. Moreover, without the need to instruct a jury on the law and formulate the relevant factual issues for their determination, it may be impossible in a trial by the court to know how the judge reached his decision, and whether he applied correct legal rules or even formulated the correct factual issues for decision.

It has been said, on the basis of empirical study, that:

> "the jury, as an expression of the community's conscience, interprets this norm [proof beyond a reasonable doubt] more generously and more intensely than does the judge. If a society wishes to be serious about convicting only when the state has been put to proof beyond a reasonable doubt, it would be well advised to have a jury system." *Kalven & Zeisel, supra,* pp. 189-190.

The other well-known values of the jury system also apply at least as forcefully to juvenile courts as to adult trials. As this record, like those in *Kent* and *Gault*, makes clear, the dangers of official arbitrariness in the juvenile court system are real. The jury system is the primary safeguard against such arbitrariness, an antidote to the pre-

judgments and predispositions that any single individual may have, no matter how well-intentioned.

It is also a guarantee that each case will receive the individualized attention it deserves, and not become just another item on an overworked judge's calendar. Trial by jury assures that each issue will receive fresh consideration, without the influence that past cases presenting similar issues may have, even unconsciously, on the mind of a judge as trier of fact. And it assures that the credibility of each witness will be evaluated in each case, without regard to how often he may have appeared before the court in the past or how well known he may be to the judge. This is a particularly important consideration in juvenile cases like the present, where the probation officer, who works under the direction of the judge, also appears as a witness to support the case against the juvenile. See Pennsylvania Law Review Comment, pp. 1186-88.

The jury is thus a unique sentinel against the summary administration of justice. Can it be believed that a jury drawn from among petitioner's neighbors, teachers, and the other people of the village of Baltimore who testified at the hearing on his pre-trial release, would have convicted him on the evidence in this case after only ten minutes of deliberation? Yet that was all the time it took the juvenile court judge to reflect on the evidence and then overrule the motion to dismiss the proceedings for failure of proof.[52]

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[52] An adult felony defendant in Ohio who waives jury trial may request a trial before three judges. Ohio Rev. Code Ann. § 2945.07. But the juvenile's fate turns on the determination of a single man, without any alternative fact-finding procedure to assure due deliberation.

believe he is at least entitled to a fact-finding process which measures up to the essentials of due process and fair treatment.'" ——N.M. at ——, —— P.2d at ——. (Quoting from *In the Interests of Carlo,* 48 N.J. 224, 225 A.2d 110, 116 (1966).[54]

Jury trial is no stranger in the juvenile courts of Ohio. Although it is denied to juveniles, an adult tried for an offense in the juvenile court is entitled to trial by jury. Ohio Rev. Code Ann. § 2151.47. This is in accord with the strong Ohio public policy in favor of trial by jury, as manifested in the State constitutional provision that:

> "In any trial, in any court, the party accused shall be allowed . . . a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed . . . ." Art. I, § 10.[55]

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[54] See Gardner, *The Kent Case and the Juvenile Court: A Challenge to Lawyers,* 52 A.B.A.J. 923, 924 (1966):

> "When the jurisdiction of a court is being invoked for a criminal offense, basic constitutional rights should be available to all—adults or juveniles. When the charge is the commission of a crime, rights should be identical, be the accused 16 or 60."
>
> "On this point, there is an interesting historical footnote in the great debates on the Fugitive Slave Law. One of the main criticisms of that Law was not slavery per se, the existence of which the Constitution recognized, but the fact that under it the alleged fugitive Negro was denied the right to bail and to a jury trial. Are our children entitled to less? Was the Constitution written only for adults?"

[55] By statute it is further provided that:

> "At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of fifty dollars, the accused has the right to be tried by a jury." Ohio Rev. Code Ann. § 2945.17.

It cannot be contended that jury trial in the adjudicative phase would interfere with the rehabilitative purposes and processes of juvenile courts. Until it has been adjudicated that he is delinquent by reason of having committed the act charged, there is no basis for assuming that he needs treatment or rehabilitation. See Harvard Law Review Note, p. 794; Pennsylvania Law Review Comment, p. 1217.

Nor can it fairly be said that the jury would inject undue "formality" into a juvenile court hearing and can constitutionally be denied for that reason alone.[56] To justify denial of jury trial in juvenile cases on this ground is simply to confuse the familiar with the necessary. It elevates judicial convenience and time-saving to a higher priority than just determination of guilt. It assumes that trial by jury is a matter of "form"—like a judge's robe or gavel—which may be dispensed with without effect on the guilt-determining process.

But the jury is the mode of trial which was evolved by our system of justice precisely because it was deemed to provide the maximum safeguards for an accused person in the determination of his guilt. Any atmosphere of formality or solemnity thereby introduced into juvenile proceedings is entirely appropriate to the adjudication whether a juvenile has committed murder. A juvenile denied a jury trial and convicted by a judge on evidence like that in the present case is unlikely to believe that he has been the beneficiary of "informal" procedures designed to help establish a therapeutic relationship between him and the judge. As this Court said in *Gault*:

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[56] This is the most frequent objection to jury trial in juvenile cases. See *Standards*, p. 73; *Commonwealth* v. *Johnson*, 234 A.2d 9 (Penn. Super. Ct. 1967).

> "the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." 387 U.S. at 26.

Nor is there any substance to the contention sometimes advanced that a jury trial would represent an intrusion of the public into the confidentiality and secrecy of juvenile proceedings.[57] As this Court recognized in *Gault*, this "claim of secrecy, however, is more rhetoric than reality" and "[e]ven the privacy of the juvenile hearing itself is not always adequately protected." 387 U.S. at 24 and 25 n. 35. As the present case illustrates, knowledge of the commission of a serious crime and the arrest of a juvenile alleged to have committed it is likely to be widespread, especially in a small community. Petitioner received none of the purported benefits of confidentiality from the fact that he was tried by a judge in the privacy of a juvenile courtroom instead of by a jury drawn from among the people of his community.

In any event, a jury trial would not be forced on an unwilling juvenile. If the juvenile would in fact benefit from the more "informal" setting of a nonjury trial, or does not want members of the public present even to the limited extent of having a jury, he and his lawyer ought to be competent to make that judgment and can waive a jury. There is no reason to assume that allowance of the jury trial right

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[57] See, *e.g.*, opinion of Justice Noble, dissenting in *Peyton* v. *Nord*, *supra*, —— N.M. at ——, —— P.2d at ——, 36 U.S.L.W. 2262.

would suddenly deluge the juvenile courts with an unmanageable load of jury trials.[58]

We simply urge that, in a serious law violation case like the present, the juvenile must be granted a jury trial if he wants it.[59] This Court has said that trial by jury is "the most priceless" safeguard for the preservation of "individual liberty and of the dignity and worth of every man." *Irvin* v. *Dowd*, 366 U.S. 717, 721 (1961). It should require more than labels and rhetoric to justify its denial to juvenile defendants.

Certainly, under the circumstances of this case, in which petitioner could not receive a fair and impartial trial from the juvenile court judge, due process requires trial by jury.

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[58] In the District of Columbia, there were three jury trials in juvenile delinquency cases in a two-year period from 1964 to 1966. Report of the President's Commission on Crime in the District of Columbia, pp. 647, 1010 n. 41 (1966); see also Harvard Law Review Note, pp. 793-794.

[59] The Canadian Department of Justice's Committee on Juvenile Delinquency has urged that juveniles should be able to avail themselves of adult criminal procedures, including jury trial, without being subjected to adult criminal penalties. *Juvenile Delinquency in Canada*, p. 82 (1965).

Under our analysis, it follows that not every law violation charge, no matter how petty, requires a jury trial. So-called "petty offenses" have not been tried by juries as of right under the Sixth Amendment and would not have to be in juvenile courts. See *Shick* v. *United States*, 195 U.S. 65 (1904); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 980 (1926). Nor would the jury trial right necessarily apply to delinquency charges such as "incorrigibility" or "truancy," or other categories of juvenile court jurisdiction which do not involve charges of crime triable by jury as of right in adult cases. See *In re Lambert, supra; In re Elmore*, 222 A.2d 255 (D.C. Ct. Apps. 1966).

III.

The Juvenile Court Denied Petitioner Due Process by Admitting Into Evidence Statements Obtained in Violation of His Privilege Against Self-Incrimination and His Right to Counsel.

The admission of petitioner's statements to law enforcement officials on the night of the discovery of Mrs. Willard's body contravened the principles laid down by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

The applicability of *Miranda* to official interrogation of juveniles suspected or accused of serious law violations can scarcely be in doubt after this Court's decision in *Gault*. *Gault* held that "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults." 387 U.S. at 55. The Court relied in support on this conclusion on *Miranda* and a number of leading cases in this Court and state courts involving pre-trial interrogation of juveniles. The rationale of *Gault* on this point was plainly not limited to testimonial compulsion of the juvenile at the adjudicative hearing, but extends to pre-hearing interrogation as well.

Moreover, this Court stated that:

> "The participation of counsel will, of course, assist *the police,* juvenile courts, and appellate tribunals *in administering the privilege.*" 387 U.S. at 55. (emphasis supplied)

Like the present case, *Gault* involved certain purported "admissions" of a juvenile, which were obtained by a juvenile court probation officer "without counsel and without

advising him of his right to silence, as far as appears." The "admissions" were not reduced to writing. This Court concluded:

> "to say the least, *the process by which the admissions were obtained and received must be characterized as lacking the certainty and order which are required of proceedings of such formidable consequences.*" 387 U.S. at 56. (emphasis supplied)

This Court's consideration of juvenile confessions in *Gault* leads to the conclusion that the *Miranda* guarantees must apply to official interrogation of juveniles suspected or accused of serious law violations, in order to safeguard the privilege against self-incrimination. *Gault* is permeated with distrust of the statements of juveniles extracted through interrogation. The Court said:

> "This Court has emphasized that admissions and confessions of juveniles require special caution . . . . Evidence is accumulating that confessions by juveniles do not aid in 'individualized treatment' . . . and that compelling the child to answer questions, *without warning or advice as to his right to remain silent,* does not serve this or any other good purpose . . . . Further, authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." 387 U.S. at 45, 51, 52. (emphasis supplied)

The need for the *Miranda* safeguards to protect juveniles is far greater than for adults because age and immaturity make it unlikely that a juvenile, particularly one as young as petitioner, will either know his constitutional rights or know how to assert them effectively. As the Court said in *Gallegos* v. *Colorado,* 370 U.S. 49, 54 (1962):

> "a 14-year old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights."

See also *Haley* v. *Ohio*, 332 U.S. 596 (1948); *In the Matter of Four Youths*, Nos. 28-776-J, 28-778-J, 28-783-J, 28-859-J, Juvenile Court of the District of Columbia, April 7, 1961, opinion of Judge Ketcham, cited in *Gault*, 387 U.S. at 54-55; *United States* v. *Glover*, 372 F.2d 43 (2d Cir. 1967).

"[T]he relative ease with which [juveniles] may be induced to make confessions if they are interrogated with a moderate amount of skill" is recognized by experts in interrogation. O'Hara, *Fundamentals of Criminal Investigation*, p. 112 (1956). When there are added the extraordinary arrest, detention, and interrogation powers over juveniles provided by the laws of many jurisdictions, see *In re Gault*, 387 U.S. at 14,[60] the case for applying the *Miranda* safeguards is even more compelling.

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[60] For example, it has been held in Ohio cases that the common law of arrest does not limit the power to take juveniles into custody, *In re L.* ——, 194 N.E.2d 797 (Juv. Ct. Cuyahoga Cy. 1963); that although arrested children are to be "taken directly" before the juvenile court, Ohio Rev. Code Ann. § 2151.25, an arrested juvenile may be interrogated before taking him to the juvenile court, *State* v. *Stewart*, 120 Ohio App. 199, 205, 201 N.E.2d 793, 798 (1963), *aff'd*, 176 Ohio St. 156, 198 N.E.2d 439 (1964), *cert. denied*, 379 U.S. 947; and that delay in taking an accused minor before the court does not require exclusion of his statements obtained in the interim, *State* v. *Lowder*, 79 Ohio App. 237, 72 N.E.2d 785 (1946), *appeal dismissed*, 147 Ohio St. 530, 72 N.E.2d 102 (1947).

Juveniles should have at least the same rights in this regard as members of the military, who are also subject to a historically separate system of law but have been held entitled to receive the *Miranda* warnings at military interrogation. The Court of Military Appeals stated:

> "The time is long since past . . . when this court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, ipso facto deprived of all protections of the Bill of Rights. Both the Supreme Court and this court are satisfied as to the application of constitutional safeguards to military trials, except insofar as they are made inapplicable either expressly or by necessary implication." *United States* v. *Tempia,* 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1956).

The principal authorities in the field concur on the need to give juveniles these safeguards, especially when, as in the present case, certification of the juvenile for trial as an adult on a serious criminal charge is a possibility. The Children's Bureau states:

> "Because of the child's presumed immaturity, special safeguards should be used during a police officer's interview with a child in investigating a delinquent act. In certain situations, depending on the age of the child and the act committed, waiver to criminal court may be a possibility. Moreover, at the time of the interview, it is not known whether the court specializing in children's cases will retain jurisdiction over the case if a petition is filed, or will waive its jurisdiction and permit the child to be tried in a criminal court. Therefore, *it cannot be always assumed that the police*

interview will lead only to a noncriminal proceeding. Therefore, in such situations all of the procedural safeguards in the criminal law should be followed.

Whether or not transfer to the criminal court is a possibility, certain procedures should always be followed. Before being interviewed, the child and his parents should be informed of his right to have legal counsel present and to refuse to answer questions or be fingerprinted if he should so decide. Since it has been held that an adult has a right to counsel at this point, there is every reason to believe that at least the same protection should apply to children. In cases where waiver is possible, he should be also cautioned that if he answers, his answers may be used not only before the specialized court but possibly in a criminal court." *Standards,* p. 49. (emphasis supplied)[61]

California, acting in the aftermath of *Gault,* has recently amended its juvenile court code to require that police and juvenile court probation officers must give the *Miranda* warnings to juveniles before interrogating them. Calif. Welf. & Inst'ns Code §§ 625, 627.5.

No serious obstacle either to effective law enforcement or to the functioning of the juvenile courts is created by the application of the *Miranda* guarantees to juveniles. The number of juveniles involved in the kinds of serious

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[61] See also Note, *The Supreme Court, 1966 Term,* 81 Harv. L. Rev. 69, 174 (1967); Comment, *Miranda Guarantees in the California Juvenile Court,* 7 Santa Clara Lawyer 114 (1966); Columbia Law Review Note, p. 333; Note, 46 Minn. L. Rev. 967, 973-974 (1962); Pennsylvania Law Review Comment, p. 1184; Altman, *The Effect of the Miranda Case on Confessions in the Juvenile Court,* 5 American Criminal Law Quarterly 79 (1967); Rubin & Shaffer, *supra,* 44 Denver L. Rev. at 76-77, 86.

law violations in which police interrogation may be indispensable for solution of the crime is only a fraction of the total of juvenile cases. See Paulsen, *Kent* v. *United States: The Constitutional Context of Juvenile Cases*, 1966 Supreme Court Review, 167, 190-191.[62]

The multitude of police and juvenile court staff contacts with juveniles which do not involve the investigation of serious crimes possibly leading to delinquency charges would not be altered or circumscribed by these procedures. And if unhampered interrogation of juveniles—without any hindrance from the privilege against self-incrimination and the presence of counsel—is considered a *desideratum* of the juvenile court system on the theory that confession is good for the juvenile soul, a simple solution to the problem is available: immunize the juvenile against the use of his statements, and other evidence obtained therefrom, either in a delinquency proceeding or in an adult trial in the event of certification. This would enable officials to interrogate without the *Miranda* warnings by removing any possibility of incrimination of the juvenile from his statements.[63]

On the assumption, then, that *Miranda* governs juvenile interrogations in serious law violation cases, we submit

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[62] Statistics of the National Crime Commission indicate that in 1965 only 8.4% of persons arrested for willful homicide were under 18. *National Crime Commission*, p. 56.

[63] This is essentially the solution devised by New York and Illinois with respect to statements made at preliminary conferences; such statements may not be admitted at an adjudicative hearing. New York Family Court Act, § 735; Illinois Juvenile Court Act, Ill. Rev. Stat. Ch. 37 § 703-8(5) (Supp. 1966). See Columbia Law Review Note, pp. 306, 333-334; *Task Force*, p. 38; *cf. Harling* v. *United States*, 295 F.2d 161 (D.C. Cir. 1961).

in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'" *Id.* at 476-477.[64]

We also contend that, under the circumstances shown by this record, petitioner's statements were involuntary and should have been excluded on that ground as well. Constitutional standards of involuntariness continue to apply alongside the requirements of *Miranda*, and the failure to observe the *Miranda* safeguards is highly relevant to the question of voluntariness:

"that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in determining the voluntariness

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[64] *Miranda* also required the exclusion of Chief Phillips' testimony that in response to the question what had happened, petitioner's father had said:

"I don't know, unless this boy." (A. 209.)

The only evidentiary theory which could allow in such testimony would be that of a tacit admission by a defendant based on his silence in the face of an accusatory statement. But this Court stated in *Miranda* that this theory is inconsistent with the privilege against self-incrimination:

"The prosecution may not therefore use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Id.* at 468 n. 37.

See also *Smith* v. *Brierly*, 2 Crim. L. Rep. 2164 (3rd Cir. 1967) (opinion of Hastie, J.), holding that the use of such a "tacit admission" is a denial of due process.

The father denied ever accusing petitioner of the crime and said that petitioner stated he did not do it and knew nothing about it. (A. 237.)

of statements later made." *Davis* v. *State*, 384 U.S. 737, 740 (1966).[65]

We submit that in the immediate context of the shocking discovery of a corpse beneath his bed, the interrogation of petitioner, barely 14 years old and without any previous contact with the law, by a battery of law enforcement officials, who did not warn him of his privilege against self-incrimination and his right to counsel, was inherently coercive. This Court emphasized in *Gault* that a strict standard must be applied to the determination of voluntariness of juvenile confessions, with particular attention paid to whether the juvenile was warned of his rights:

> "If counsel was not present for some permissible reason when an admission was obtained, *the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights* or of adolescent fantasy, fright or despair." 387 U.S. at 55. (emphasis supplied)

A 14-year old, this Court has said:

> "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without

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[65] There can be no doubt that constitutional standards of involuntariness apply to juvenile delinquency proceedings. *In re Gault, supra*, 387 U.S. at 55. See also *In the Matter of Gregory W. and Gerald S.*, 19 N.Y.2d 55, 224 N.E.2d 102 (1966); *In the Interests of Carlo*, 48 N.J. 224, 255 A.2d 110 (1966); *United States* v. *Morales*, 223 F.Supp. 160 (D. Mont. 1964), all cited approvingly by this Court in *Gault*; Quick, *Constitutional Rights in the Juvenile Court*, 12 How. L. J. 76, 102 (1966).

advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself." *Gallegos* v. *Colorado, supra,* 370 U.S. at 54.

Under the principle of those cases and on the facts of this one, petitioner's statements to the interrogating authorities must be held to have been involuntary.

IV.

Petitioner Was Denied Due Process and Equal Protection by Being Deprived of the Right to Pre-Hearing Release and Subjected to Cruel and Inhuman Punishment Both Before and After the Adjudicative Hearing.

A. This record shows an unconscionable abuse of the detention power over a juvenile pending adjudicative hearing. The record establishes that:

1. There was no significant danger of flight by petitioner. His roots in the community were lifelong and deep. He had just turned fourteen, lived with his parents, went to school, regularly attended church and Sunday School, and participated in a variety of youth activities.

2. As the District Court of Appeals found, there "was an abundance of evidence" as to his "good character and reputation." He had been "obedient at home and at school and subjected himself to the reasonable control of both his parents and teachers." (A. 264.) He had never been in trouble with the law before.

3. Everyone who testified from a cross-section of his village agreed that there was no danger to the community if he was released to the custody of his parents. No one expressed any fear of his being free prior to his hearing.

4. He was charged with an act which would be a non-capital crime if committed by an adult, second-degree murder. The presumption of his innocence was deeply felt in the community. The evidence of his guilt—which the State never advanced at the release hearing as a ground for denying him release—was so thin as to amount to little more than suspicion, as we have discussed in Point I.

5. The detention facilities under which he was being held in solitary confinement were unfit. Indeed, the District Court of Appeals, on its own view of the premises, subsequently held the jail an illegal place of confinement for petitioner after he had been there for 78 days—27 of them before his hearing.

6. His parents and minister testified that it would be injurious to his health and well-being to remain in the jail under the conditions of his solitary confinement there.

7. The existence of reasonable alternatives was demonstrated, in the form of release to his parents or a neighbor. His parents were willing to accept any conditions the court might impose to assure his appearance for trial.

As against all this, the State offered only the contention that *if* he committed the crime, he would be dangerous to the community. The Prosecuting Attorney stated:

> "Now I regret always anyone having to be held in juvenile detention or jail, either one, Judge; we don't

like that. *But it is a situation of their doing, not ours;*" (A. 68-69.) (emphasis supplied)

And the juvenile court denied petitioner release without any findings and without any statement of reasons.

Denial of pre-hearing release under these circumstances contravenes some of the most basic assumptions of our system of justice. Chief Justice Vinson said that since 1789:

> "federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. *This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.* [Citations omitted] *Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.*" *Stack* v. *Boyle,* 342 U.S. 1, 4 (1952). (emphasis supplied)[66]

If petitioner had been over 18 and charged with second-degree murder, he would have had an absolute right to bail under the Ohio Constitution, providing that:

> "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." Art. I, § 9.[67]

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[66] "The law of bail stands four-square across the path to the easy assumption that he who is charged with crime is indiscriminately dangerous." Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 Yale L. J. 1149, 1195 (1960).

[67] The bail language of the Ohio Constitution is virtually the same as that of the famous Northwest Ordinance of 1787. The latter is

See also Ohio Rev. Code Ann. § 2937.03.

This right to bail is not limited to criminal cases in Ohio but applies in civil cases as well:

> "[A]t the present time statutory and constitutional provisions have become so general that it can be said that one has the right to bail in all civil cases, involving the arrest of the defendant . . . every person arrested in a civil action is entitled to bail upon giving bond with sufficient sureties or upon deposit of money in lieu of bail." 7 Ohio Juris.2d, Bail and Recognizance, § 54, p. 78.

Adults charged with offenses triable in the juvenile courts receive the benefits of bail just as they would if tried in the adult courts. Ohio Rev. Code Ann. § 2151.46. And a juvenile charged with a bailable felony and certified to adult court is placed on a recognizance for his appearance in that court. *Id.* § 2151.26.

Thus, once again, juveniles charged in the juvenile court constitute a unique class. See *State ex rel. Peaks* v.

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contemporaneous with the Eighth Amendment to the Federal Constitution, which was clearly intended to create the same absolute right of pre-trial release in noncapital cases. See Foote, *The Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 959, 1125 (1965); Remarks of Chief Justice Warren, National Conference on Bail and Criminal Justice, Proceedings, May 27-29, 1964, Interim Report, May 1964-April 1965, p. 7 (hereinafter cited as "National Conference on Bail and Criminal Justice").

Although it appears that this Court has not explicitly passed on the right of bail in state court proceedings under the Fourteenth Amendment, lower federal courts have treated it as applicable: "We take it for granted that . . . the prohibition in the Eighth Amendment against requiring excessive bail must now be regarded as applying to the States, under the Fourteenth Amendment." *Pilkinton* v. *Circuit Court*, 324 F.2d 45, 46 (8th Cir. 1963); *Mastrian* v. *Hedman*, 326 F.2d 708, 711 (8th Cir. 1964), *cert. denied*, 376 U.S. 965.

Allaman, 115 N.E.2d 849 (Ohio App. 1952). As this case illustrates, their liberty pending adjudicative hearing is in the discretion of one man, the juvenile court judge, despite the public policy of the state in favor of releasing juveniles to their parents.[68]

We submit that such an absolute power is incompatible with the rule of law. As this Court said in *Kent, supra,* in words which cannot be emphasized too strongly, juvenile court acts do not "confer upon the Juvenile Court a license for arbitrary procedure." 383 U.S. at 553. Instead of the presumption of innocence, the right to be free from punishment prior to adjudication, and the opportunity to assist his counsel effectively and without restriction in preparation of his defense, petitioner received 27 days of solitary confinement prior to his hearing in an adult jail unfit and illegal for his confinement.

Moreover, this case is merely the tip of the iceberg. The National Crime Commission laid great stress on the evils and abuses arising from the unregulated discretionary powers of detention over juveniles in many states: detention without showing of danger to the community safety or need to protect the juvenile; detention employed for shock effect; detention without articulated standards; inadequate and overcrowded detention facilities, frequently

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[68] The juvenile code provides:

"Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the juvenile court, accept the written promise of the parent, guardian, or custodian to bring the child to the court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian." Ohio Rev. Code Ann. § 2151.31.

leading to confinement of juveniles in adult jails, as occurred in this case.[69]

Judge George Edwards has graphically described the abuses of detention, of which this case is a grievous example:

> "I charge that thousands upon thousands of children now in detention in this country are held behind bars without court hearing or order, and under circumstances which many lawyers deem in violation of the Constitution of the United States.
>
> I charge that hundreds upon hundreds of children are held illegally in adult jails each year in this country.
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> I charge that most children now in detention are held in institutions which at best represent cold storage, and at worst penal regimes similar to adult penitentiary practices, and that in 1964 treatment for and human concern and contact with children in detention is the exception, in the detention homes of this country, rather than the rule." National Conference on Bail and Criminal Justice, pp. 262-263.[70]

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[69] *Task Force,* pp. 13, 19, 36-37. A study prepared for the Commission showed that for 93 percent of the country's juvenile court jurisdictions, serving 44.3 percent of the population, "there is no place of detention other than the county jail, and many of the jails used for children are unsuitable even for adult offenders." *Id.* at 37.

The Prosecuting Attorney in this case stated that 127 children were held in the Fairfield County jail in 1965, for periods as long as 92 days. (A. 68.)

[70] See also Freed & Wald, *Bail in the United States: 1964,* report to the National Conference on Bail and Criminal Justice, p. 105:

(continued on following page)

The effects of pre-trial detention on the guilt-determining process in adult cases have been documented, and there is no reason to believe they are any less adverse in juvenile cases. Persons held in custody before trial have a substantially greater chance of being found guilty than persons who are released and are freely available to consult with and assist their counsel. See Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. Rev. 631 (1964); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641 (1964).

The only resolution of this issue consistent with our traditions and adapted to the abuses of juvenile detention is the recognition either of a right of bail for juveniles or its substantial equivalent in the form of a right of prehearing release. As Judge Edwards has said:

> "the juvenile code and the whole philosophy of the juvenile court mandate such pre-hearing release even more specifically than our statutes mandate the right to bail." National Conference on Bail and Criminal Justice, at 265.

Judge Orman Ketcham, past president of the National Council of Juvenile Court Judges, concurs:

"over 100,000 children are detained each year in ordinary jails or jail-like structures and according to the National Council on Crime and Delinquency, the number increases each year. . . . With a few notable exceptions, juvenile detention facilities have been characterized as a 'national disgrace.'"

In addition, denial of bail to children involved in civil rights demonstrations has been a frequent occurrence and "the practice has had a serious punitive effect." Goldfarb, *Ransom*, p. 73 (1965). See *Ex parte Cromwell*, 232 Md. 305, 192 A.2d 775 (1963).

"I personally believe that, where a youth is charged with a violation of the criminal law which he denies, the juvenile court, if it is not willing to release him to his parents on their personal assurances, should permit his parents to post bail bond for him pending trial." *Id.* at 284.

Other leading authorities have stated that:

"In any jurisdiction where children are detained before trial, for long periods, without hearings, in miserable quarters, or commingled with adults, the philosophy of the juvenile court system is betrayed. Wherever this occurs, a suitable alternative to detention should be found, for no good reason appears why the law should accord a child fewer rights and less protection than his elders." Freed & Wald, *Bail in the United States: 1964*, p. 111.

See also Boches, *supra*, 19 Hastings L. J. at 76-77.

The right to bail for juveniles has been recognized by statute and judicial decision in a number of jurisdictions. Others have fashioned a right to release under appropriate conditions, unless the necessity for detention under prescribed judicial standards is demonstrated.[71]

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[71] Jurisdictions recognizing either a right to bail or such a right of prehearing release are set forth in Appendix C, *infra*.

"If the relevant statute is silent on the subject it should be read as assuming the right to bail exists when a child is placed in detention. If release on bail is denied by statute, it must be denied only after a judicial determination that considerations of safety require detention. Any other justification for detention without bail discriminates against the child. At least in the situation where the child may be certified for criminal trial, there seems little doubt that this discrimination

"detention of a child is rarely desirable before an adjudication and rarely is needed to avoid a grave risk to the community or the child." Comment to *id.* § 727.[72]

Likewise, California has provided that a juvenile shall be released pending hearing unless:

"it appears that such minor has violated an order of the juvenile court or has escaped from the commitment of the juvenile court or that it is a matter of immediate and urgent necessity for the protection of such minor or the person or property of another that he be detained or that such minor is likely to flee the jurisdiction of the court. . . . " Calif. Welf. & Inst'ns Code § 635.[73]

Detention pending adjudicative hearing is not the discretionary act of a single man under such statutory provisions,

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[72] Compare the comment of Assistant Chief of Police Raymond A. Dahl of Milwaukee, Wisconsin:

"A child should not be placed in detention when his parents can and will control him and present him at court when ordered."

"Children should not be detained merely to facilitate a police investigation or merely because of the seriousness of the offense or the suspicion of the commission of a crime." National Conference on Bail and Criminal Justice, p. 268.

[73] This is in accord with the recommendations of the National Council on Crime and Delinquency, urging that detention be limited essentially to juveniles who "are almost certain to run away" pending final adjudication and disposition, "or almost certain to commit an offense dangerous to themselves or to the community" in such period, or who must be held for another jurisdiction. National Council on Crime and Delinquency, Standard Juvenile Court Act, Comment on Section 17, pp. 40-41 (1959). The Council also states:

"Jailing of any child under sixteen should not be tolerated anywhere." *Id.* at 40.

but a judicial determination, made after hearing, according to prescribed standards as applied to the facts of an individual case. Petitioner's pre-hearing detention, on the other hand, was ordered without standards, without reasons, and in the teeth of the evidence. It was detention based on fiat, not law.

It should be emphasized that the right of pre-hearing release for which we contend does not contemplate delivering juveniles into the hands of professional bondsmen or making release dependent on ability to pay—aspects of the traditional bail system which have led some persons to urge that it not be applied to juvenile courts. See *Task Force*, p. 36. In this respect the Federal Bail Reform Act of 1966, 18 U.S.C. § 3146, provides a model of how a right of pre-trial release can be implemented through imaginative use of judicially imposed conditions to assure appearance at trial. That Act provides that any person charged with a noncapital offense "shall be released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond" unless it is judicially determined that this will not "reasonably assure" his appearance. In that eventuality, a judicial officer is authorized to impose specified conditions to assure his appearance, *inter alia*:

(1) placing the person "in the custody of a designated person or organization agreeing to supervise him";

(2) restricting his "travel, association, or place of abode" during release;

(3) requiring deposit of security with the court or execution of a bail bond; or

(4) "any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours." *Id.* § 3146(a).

There is no reason why a similar utilization of the power to release on appropriate conditions cannot be employed by juvenile courts. It will enable them to give maximum protection to any legitimate community interests in a particular case in preventing harm to the juvenile himself or to others and to the overriding interest of the juvenile in maintaining his personal liberty prior to adjudicative hearing.[74]

B. We also contend that petitioner's solitary confinement in the county jail for a period of 78 days—27 before hearing and the remainder afterward—constituted the infliction of cruel and inhuman punishment on him, in violation of his constitutional rights.[75] This Court should establish that such punishment of juveniles cannot be countenanced under generally accepted standards of the enlightened administration of justice in this country.

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[74] The United States Court of Appeals for the District of Columbia Circuit in *Fulwood* v. *Stone*, No. 21,401, decided November 28, 1967, said:

> "Even when removal from the family is deemed necessary it does not follow that the juvenile is automatically to be committed to the Receiving Home. . . . The choices are not so limited. The Juvenile Court has a duty to fashion an appropriate disposition. . . ." Slip Opinion, p. 7.

The Court also commented:

> "Since the Receiving Home is hardly 'equivalent to' the ordinary home environment [citation omitted], it should only be a last resort where no suitable alternative exists." *Id.*

[75] The "cruel and unusual punishment" clause of the Eighth Amendment has been held applicable to the states under the Fourteenth Amendment. *Robinson* v. *California*, 370 U.S. 660 (1962).

> "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles,* 346 U.S. 86, 100-01 (1958) (opinion of Chief Justice Warren).

That petition was subjected to punishment by his imprisonment in the county jail cannot be doubted. The District Court of Appeals held his confinement to be illegal under state law after it had gone on for 78 days. During this period, there was no "treatment," no attempted "rehabilitation" of petitioner—even assuming that he needed it, which we deny. There was simply solitary confinement in a jail cell.

Ohio law makes it plain that such imprisonment contravened the basic purposes and justifications of the juvenile code: to provide "correction and rehabilitation" and not "punishment." *Cope* v. *Campbell,* 175 Ohio St. 475, 478, 196 N.E.2d 457, 459 (1964). Not only is it unlawful to detain a juvenile in an adult penal institution under the conditions to which petitioner was subjected, but the law puts an affirmative duty on the boards of county commissioners to provide a juvenile detention home for juvenile offenders pending their final disposition. This place of detention "shall be furnished and carried on, as far as possible, *as a family home* in charge of a superintendent or matron in a non-punitive neutral atmosphere." Ohio Rev. Code Ann. § 2151.34. (emphasis supplied). During the school year,

when feasible, a "comparable educational program" is to be provided for children of school age. Medical and mental health facilities shall be made available "to insure the courts all possible treatment facilities shall be given to those children placed under their care." *Id.* The state thus has defined the appropriate conditions and atmosphere in which treatment and rehabilitation of juveniles shall take place; petitioner's imprisonment, on the other hand, had all the earmarks of punishment.[76]

It also cannot be doubted that petitioner's imprisonment under the conditions shown in this record was punishment of cruel and inhuman character. He was treated worse than an adult criminal would have been. By reason of the denial of his pre-hearing release, he was subjected to imprisonment in advance of any adjudication of guilt, punishment which an adult would not have received because of the right of adults to bail.

This Court has had occasion to comment at length on the evils of solitary confinement, even for convicted adult murderers. In *Medley* v. *State,* 134 U.S. 160 (1890), this Court ordered the release of a convicted murderer, who had been condemned to death and ordered held in solitary confinement pending his execution under an *ex post facto* statute. The Court characterized the solitary confinement provision as "an additional punishment of the most important and painful character." 134 U.S. at 171.

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[76] The duty of the county officials to provide a detention home of the prescribed character is deemed so important that it has been held enforceable by mandamus. *State ex rel. Ray* v. *South,* 176 Ohio St. 241, 199 N.E.2d 919 (1964); 1961 Op. Atty. Gen., p. 75. See also Ohio Rev. Code Ann. § 2151.65, providing for schools, forestry camps, or other facilities where delinquents "may be held for *training, treatment,* and *rehabilitation.*" (emphasis supplied)

The Court traced the history of solitary confinement in Anglo-American law back to its first statutory enactment in the time of George II, when it was provided for convicted murderers. The Court stated:

> "it was considered as an additional punishment of such a severe kind that it is spoken of in the preamble as 'a further terror and peculiar mark of infamy' to be added to the punishment of death." *Id.* at 170.

Provision for solitary confinement was subsequently repealed in England by statute because "public sentiment revolted against this severity." *Id.* Experimentation with it as a mode of punishment in America disclosed that:

> "A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community." *Id.* at 168.

If solitary confinement has been deemed by this Court to be punishment of such severity in the case of an adult, how much more so must it be for a 14-year old boy—abruptly wrenched from his home, separated from his parents and his friends, interrupted in his schooling, and thrust alone into a prison cell. If solitary confinement is cruel and unusual punishment for a convicted adult murderer, it must be so for a juvenile, who has not committed a crime according to the juvenile code and is ostensibly a ward of the state entitled to its special care and treatment.

Even for a day, this imprisonment would be cruel and inhuman, yet it continued for 78 days.

This Court has said:

> "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Robinson* v. *California*, 370 U.S. 660, 667 (1962).

This denial of petitioner's constitutional rights should invalidate the proceedings against him. Otherwise it is difficult to see how the constitutional prohibition against cruel and unusual punishment—so egregiously violated here—can be enforced in his case. This Court would also make it clear thereby that subjection of children to such cruelty and inhumanity is intolerable in a free country.[77]

In any event, what petitioner has been subjected to shows the reality underlying this Court's statement in *Kent* that:

> "There is evidence . . . that there may be grounds for concern that the child receives the worst of both

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[77] "Just as the only effective way to discourage lawless collection of evidence is to make its finding inadmissible and its efforts profitless so the only effective way to discourage excesses by prison officials might be to loose the object of their cruel and unusual punishment. Such releases might be a cheap price to pay for prison reforms due to resulting pressure by the public on the responsible officials." Sutherland, *Due Process and Cruel Punishment*, 64 Harv. L. Rev. 271, 272-273 (1950). *Cf. Weems* v. *United States*, 217 U.S. 349 (1910); *Medley* v. *State*, *supra*; *Johnson* v. *Dye*, 175 F.2d 250 (3rd Cir. 1949), *rev'd on other grounds*, 338 U.S. 864 (1949).

worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." 383 U.S. at 556.

A principal justification for denial to juveniles of procedural rights accorded to adults has been that juveniles are afforded "special consideration and treatment." *In re Gault*, 387 U.S. at 22-23 n. 30. This case demonstrates how illusory this notion of a *quid pro quo* can be. Petitioner was denied the procedural rights of an adult charged with crime. In return he received 78 days of solitary confinement and was adjudged a murderer on insubstantial evidence by inherently unfair fact-finding procedures. If the premise of the system fails in petitioner's case, the denial to him of basic constitutional rights must fall with it.[18]

These cases—*Kent*, *Gault*, and now this case—are like searchlights cast into the recesses of the juvenile court system in this country. They illuminate some of the institutional weaknesses of the system and point the way to its improvement without sacrifice of its distinctive values or its potentiality for achievement.

But this case is also a human tragedy. Petitioner has lost a year and a half of one of the most precious things he will ever have—his youth. This loss can never be restored to him, but his liberty can. And the liberty of others throughout this country can be safeguarded by protecting his rights. This Court should vindicate his constitutional

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[18] See *In re Gault*, *supra*, 387 U.S. at 22-23 n. 30; Wheeler, Cottell & Romasco, *Juvenile Delinquency—Its Prevention and Control, Task Force*, pp. 421-422.

rights and allow him to be restored to his family and community to try to pick up the severed thread of his life.

Conclusion

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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APPENDICES

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, § 9, of the Ohio Constitution provides:

> "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."

Article I, § 10, of the Ohio Constitution provides in pertinent part:

> "In any trial, in any court, the party accused shall be allowed . . . a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed."

The Ohio juvenile court statutes provide in pertinent part:

Section 2151.01 Definitions:

> "(A) As used in the Revised Code, 'juvenile judge' or 'juvenile court' means the judge or the court exercising the powers and jurisdiction conferred in sections 2151.01 to 2151.54, inclusive, of the Revised Code.
>
> (B) As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code:

(1) 'Child' includes any child under eighteen years of age, except that wherever reference is made in such sections to a crippled or otherwise physically handicapped child 'child' includes any person under twenty-one years of age.

(2) 'Adult' includes any person eighteen years of age, or over, who is not a 'child' within the meaning of division (B)(1) of this section.

(3) 'Foster home' means a family home in which any child is received apart from his parents for care, supervision, or training.

(4) 'Certified foster home' means a foster home operated by persons holding a permit in force, issued pursuant to sections 5103.03 to 5103.05, inclusive, of the Revised Code.

(5) 'Organization' means any institution, public, semipublic, or private, and any private association, society, or agency located or operating in the state, incorporated or unincorporated, having among its functions the furnishing of protective services or care for children, or the placement of children in foster homes or elsewhere.

(6) 'Certified organization' means any organization mentioned under division (B)(5) of this section which holds a certificate in force, issued pursuant to sections 5103.03 to 5103.05, inclusive, of the Revised Code.

(7) 'Relative' of, or person 'related by blood or marriage' to any child means any person or the spouse of any person whose relationship to such child is not more distant than that of first cousin; that is, not more distant than four degrees of relationship reckoned according to civil law."

Section 2151.02 "Delinquent child" defined:

"As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'delinquent child' includes any child:

(A) Who violates any law of this state, the United States, or any ordinance or regulation of a subdivision of the state, except as provided in section 2151.021 [2151.02.1] of the Revised Code;

(B) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient;

(C) Who is an habitual truant from home or school;

(D) Who so deports himself as to injure or endanger the morals or health of himself or others;

(E) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority."

Section 2151.03 "Neglected child" defined:

"As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'neglected child' includes any child:

(A) Who is abandoned by his parents, guardian or custodian;

(B) Who lacks proper parental care because of the faults or habits of his parents, guardian, or custodian;

(C) Whose parents, guardian or custodian neglects or refuses to provide him with proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals, or well being;

(D) Whose parents, guardian, or custodian neglects or refuses to provide the special care made necessary by his mental condition;

(E) Who is found in a disreputable place, visits or patronizes a place prohibited by law; or associates with vagrant, vicious, criminal, notorious, or immoral persons;

(F) Who engages in an occupation prohibited by law, or is in a situation dangerous to life or limb or injurious to the health or morals of himself or others."

Section 2151.04 "Dependent child" defined:

"As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'dependent child' includes any child:

(A) Who is homeless or destitute or without proper care or support, through no fault of his parents, guardian, or custodian;

(B) Who lacks proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian;

(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship;

(D) Whose parent or parents or legal guardian or custodian have placed or attempted to place such child in violation of sections 5103.16 and 5103.17 of the Revised Code."

Section 2151.05 Child without proper parental care:

"Under sections 2151.01 to 2151.54, inclusive, of the Revised Code, a child whose home is filthy and unsanitary; whose parents, stepparents, guardian, or custodian permit him to become dependent, neglected, or delinquent; whose parents, stepparents, guardian, or custodian, when able, refuse or neglect to provide him with necessary care, support, medical attention, and educational facilities; or whose parents, stepparents, guardian, or custodian fail to subject such child to necessary discipline is without proper parental care or guardianship."

Section 2151.07 Court having jurisdiction; absence of judge:

"The juvenile court, or the court of common pleas, division of domestic relations, of any county, separately and independently created, established, and functioning as such, has and shall exercise the powers and jurisdiction conferred in sections 2151.01 to 2151.55, inclusive, and section 2151.99 of the Revised Code. Except in counties in which there now is or may hereafter be created, a separate and independent juvenile court or court of domestic relations, there is hereby established within the probate court a juvenile court, presided over by the probate judge, which shall be a court of record and exercise the powers and jurisdiction of such a court.

Whenever the juvenile judge of the juvenile court is absent from the county, or is unable to attend court, or the volume of cases pending in court necessitates it, upon the request of said judge, the presiding judge of the court of common pleas shall assign a judge of the court of common pleas of the county to act in his place or in conjunction with him. If no such judge is available for said purpose, the chief justice of the supreme court shall assign a judge of the court of common pleas, a juvenile judge, or a probate judge from some other county to act in the place of such judge or in conjunction with him, who shall receive such compensation and expenses for his services as is provided by section 141.07 of the Revised Code for judges assigned to hold court in courts of common pleas."

Section 2151.13 Employees; compensation; bond:

"The juvenile judge may appoint such bailiffs, probation officers, and other employees as are necessary and may designate their titles and fix their duties, compensation, and expense allowances. The juvenile

court may by entry on its journal authorize any deputy clerk to administer oaths when necessary in the discharge of his duties. Such employees shall serve during the pleasure of the judge.

The compensation and expenses of all employees and the salary and expenses of the judge shall be paid in semimonthly installments by the county treasurer from the money appropriated for the operation of the court, upon the warrant of the county auditor, certified to by the judge.

The judge may require any employee to give bond in the sum of not less than one thousand dollars, conditioned for the honest and faithful performance of his duties. The sureties on such bonds shall be approved in the manner provided by section 2151.12 of the Revised Code. The judge shall not be personally liable for the default, misfeasance, or nonfeasance of any employee from whom a bond has been required."

Section 2151.14 Duties and powers of probation department; records; command assistance:

"The chief probation officer, under the direction of the juvenile judge, shall have charge of the work of the probation department. The department shall make such investigations as the juvenile court directs, keep a written record of such investigation, and submit the same to the judge or deal with them as he directs. The department shall furnish to any person placed on probation a statement of the conditions of probation and shall instruct him regarding them. The department shall keep informed concerning the conduct and condition of each person under its supervision and shall report thereon to the judge as he directs. Each probation officer shall use all suitable methods to aid persons on probation and to bring about improvement in their conduct and condition. The department shall keep full records of its work, keep accurate and com-

plete accounts of money collected from persons under its supervision, give receipts therefor, and make reports thereon as the judge directs.

The reports and records of the department shall be considered confidential information and shall not be made public. A probation officer may serve the process of the court within or without the county, and may make arrests without warrant upon reasonable information or upon view of the violation of sections 2151.01 to 2151.54, inclusive, of the Revised Code, detain the person arrested pending the issuance of a warrant, and perform such other duties, incident to his office, as the judge directs. All sheriffs, deputy sheriffs, constables, marshals, chiefs of police, and other police officers shall render assistance to probation officers in the performance of their duties when requested to do so by any probation officer."

Section 2151.15 Powers and duties vested in county department of probation:

"When a county department of probation has been established in the county and the juvenile judge does not establish a probation department within the juvenile court as provided in section 2151.14 of the Revised Code, all powers and duties of the probation department provided for in sections 2151.01 to 2151.54, inclusive, of the Revised Code, shall vest in and be imposed upon such county department of probation.

In counties in which a county department of probation has been or is hereafter established the judge may transfer to such department all or any part of the powers and duties of his own probation department; provided that all juvenile cases shall be handled within a county department of probation exclusively by an officer or division separate and distinct from the officers or division handling adult cases."

Section 2151.16 Referees; powers and duties:

"The juvenile judge may appoint and fix the compensation of referees who shall have the usual power of masters in chancery cases, provided, in all such cases submitted to them by the juvenile court, they shall hear the testimony of witnesses and certify to the judge their findings upon the case submitted to them, together with their recommendation as to the judgment or order to be made in the case in question. The court, after notice to the parties in the case of the presentation of such findings and recommendation, may make the order recommended by the referee, or any other order in the judgment of the court required by the findings of the referee, or may hear additional testimony, or may set aside said findings and hear the case anew. In appointing a referee for the trial of females, a female referee shall be appointed where possible."

Section 2151.17 Rules of juvenile court:

"The juvenile court may prescribe rules regulating the docketing and hearing of causes, motions, and demurrers, and such other matters as are necessary for the orderly conduct of its business and the prevention of delay, and for the government of its officers and employees, including their conduct, duties, hours, expenses, leaves of absence, and vacations."

Section 2151.18 Records; annual report; copies for distribution:

"The juvenile court shall maintain records of all official cases brought before it, including an appearance docket, a journal, and a cashbook. The court shall maintain a separate docket for traffic offenses, in which case, all traffic cases shall be recorded thereon instead of on the general appearance docket. The parents of any child affected, if living, or if deceased,

the nearest of kin, may inspect such records, either in person or by counsel during the hours in which such court is open.

Not later than June of each year, the court shall prepare an annual report covering the preceding calendar year showing the number and kinds of cases that have come before it, the disposition thereof, and such other data pertaining to the work of the court as the juvenile judge directs or as the department of public welfare requests. Copies of such report shall be filed with such department and with the board of county commissioners. With the approval of such board copies may be printed for distribution to persons and agencies interested in the court or community program for dependent, neglected, or delinquent children and juvenile traffic offenders. The number of copies ordered printed and the estimated cost of each printed copy shall appear on each copy of such report printed for distribution."

Section 2151.19 Summons; expense:

"The summons, warrants, citations, subpoenas, and other writs of the juvenile court may issue to a probation officer of any such court or to the sheriff of any county or any marshal, constable, or police officer, and the provisions of law relating to the subpoenaing of witnesses in other cases shall apply in so far as they are applicable.

When a summons, warrant, citation, subpoena, or other writ is issued to any such officer, other than a probation officer, the expense in serving the same shall be paid by the county, township, or municipal corporation in the manner prescribed for the payment of sheriffs, deputies, assistants, and other employees."

Section 2151.23 Jurisdiction:

"(A) The juvenile court has exclusive original jurisdiction under the Revised Code:

(1) Concerning any child who is a juvenile traffic offender or who is delinquent, neglected, dependent, crippled, or otherwise physically handicapped;

(2) To determine the custody of any child not a ward of another court of this state;

(3) To determine the paternity of any child alleged to have been born out of wedlock and to provide for the support of such child, subject to the concurrent jurisdiction of other courts.

(B) Such court has original jurisdiction to determine all cases of misdemeanors charging adults:

(1) With contributing to, encouraging, or tending to cause by any act or omission the delinquency, neglect, or dependency of any child;

(2) With any act or omission with respect to any child, which act or omission is a violation of any state law or any municipal ordinance;

(3) With abandonment or failure to provide subsistence to any child for which he is legally responsible.

(C) Such court, except as to juvenile courts separately and independently created, has jurisdiction to hear, determine, and make a record of any action for divorce or alimony involving the custody or care of children filed in the court of common pleas and certified by the presiding judge of the court of common pleas with all the papers filed therein to the court for trial, provided that no such certification shall be made to any court unless the consent of the juvenile judge is first obtained. After such certification is made and consent obtained, the court shall proceed as if such action were originally begun in said court, except as to awards for alimony or support due and unpaid at

the time of certification, over which the court has no jurisdiction.

(D) Such court has jurisdiction to hear and determine the case of any child certified to the court by any court of competent jurisdiction, and to make disposition of said child in accordance with sections 2151.01 to 2151.54, inclusive, of the Revised Code.

Section 2151.24 Separate room for hearings:

"The board of county commissioners shall provide a special room not used for the trial of criminal or adult cases, when available, for the hearing of the cases of dependent, neglected, and delinquent children."

Section 2151.25 Arrest of child:

"When a child is arrested under any charge, complaint, affidavit, or indictment, whether for a felony or a misdemeanor, such child shall be taken directly before the juvenile court. If the child is taken before a judge of the county court, mayor, judge of the police or municipal court, or judge of the court of common pleas other than a juvenile court, such judge of the county court, mayor, judge of the police or municipal court, or judge of the court of common pleas shall transfer the case to the juvenile court. The officers having such child in charge shall take him before the juvenile judge, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before him in the first instance. Upon such transfer or taking of such child before such judge, all further proceedings under the charge, complaint, information, or indictment shall be discontinued in the court of said judge of the county court, mayor, police or municipal judge, or judge of the court of common pleas other than a juvenile court, and the case relating to such child shall thenceforth be within the exclusive juris-

diction of the juvenile court and shall be deemed to be upon a complaint filed in such court as fully as if the appearance of such child had been upon a complaint filed in and a citation or warrant of arrest originally issued by such court."

Section 2151.26 Child charged with felony:

"In any case involving a delinquent child under sections 2151.01 to 2151.54, inclusive, of the Revised Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the bureau of juvenile research, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case."

Section 2151.27 Complaint involving child:

"Any person having knowledge of a child under eighteen years of age who appears to be a juvenile traffic offender or to be delinquent, neglected, or dependent, or of a crippled or otherwise physically handicapped child under twenty-one years of age may, with respect to such juvenile traffic offender or such delinquent, neglected, or dependent child, file a sworn complaint, and with respect to such crippled or otherwise physically handicapped child file an application for care in the juvenile court of the county in which such child has a residence or legal settlement, or in which such traffic offense, delinquency, neglect, or de-

pendency occurred, or, in case of a crippled child, where such child is found. Such application or sworn complaint may be upon information and belief and, except for traffic offenses, shall be sufficiently definite by using the word delinquent, neglected, dependent, crippled, or physically handicapped, as the facts may be."

Section 2151.28 Citation of parties; hearing, subpoena:

"After a complaint or an application for care has been filed under section 2151.27 of the Revised Code, and after such further investigation as the juvenile court directs, unless the parties voluntarily appear, the court shall issue a citation reciting briefly the substance of the complaint or application and requiring the parents, guardian, or the persons who have the custody or control of the child, or with whom such child may be, to appear personally and bring the child before the court at the time and place stated. If the person cited is other than the parent or guardian of the child, then the parent or guardian, or both, shall also be notified of the pendency of the case and of the time and place of hearing.

Before any temporary commitment is made permanent, the court shall fix a time and place for hearing and shall cause notice thereof to be served upon the parent or guardian of the child, or published, as provided in section 2151.29 of the Revised Code.

Any person whose presence is considered necessary and who is not cited may be subpoenaed to appear and testify at the hearing. Any one cited or subpoenaed to appear who fails to do so may be punished, as in other cases in the court of common pleas, for contempt of court. Persons subpoenaed shall be paid the same witness fees as are allowed in the court of common pleas.

If it appears that the child is in such conditions or surroundings that his welfare requires that his custody be immediately assumed by the court, the juvenile judge may cause an order to be indorsed upon the citation that the officer serving the same shall take the child into custody at once."

Section 2151.29 Service of citations, notices, and subpoenas; publication of citation:

"Services of the citations, notices, and subpoenas, prescribed by section 2151.28 of the Revised Code, shall be made by delivering a copy to the person cited, notified, or subpoenaed, or by leaving a copy at his usual place of residence; provided that if the juvenile judge is satisfied that such service is impracticable, he may order service by registered mail.

Whenever it appears from affidavit that a parent, guardian, or other person having the custody of such child resides or has gone out of the state or that his place of residence is unknown so that such citation cannot be served on him, the clerk shall publish such citation once in a newspaper published in the county and of general circulation throughout the county, if there is one so published. The citation shall state the substance and the time and place of the hearing, which shall be held at least one week later than the date of the publication. A copy of such citation shall be sent by mail to the last known address of such parent, guardian, or other person having custody of such child, unless said affidavit shows that a reasonable effort has been made without success to ascertain such address. The certificate of the clerk that such publication has been made or such citation mailed shall be sufficient evidence thereof. When such period of one week from the time of publication has elapsed, the juvenile court shall have full jurisdiction to deal with such child as provided by sections 2151.01 to 2151.54, inclusive, of the Revised Code."

Section 2151.30 Issuance of warrant:

"In any case when it is made to appear to the juvenile judge that the service of a citation under section 2151.29 of the Revised Code will be ineffectual or the welfare of the child requires that he be brought forthwith into the custody of the juvenile court, a warrant may be issued against the parent, custodian, or guardian, or against the child himself."

Section 2151.31 Custody of child pending hearing; child may be fingerprinted:

"Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the juvenile court, accept the written promise of the parent, guardian, or custodian to bring the child to the court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian. If not so released, such child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to the place of detention designated by the court, and the officer taking such child shall immediately notify the court with a written report of the condition or situation which caused the child to be brought in and shall file a complaint when directed to do so by the court.

In the case of any child whose custody has been assumed by the court, pending the final disposition of the case, the child may be released in the custody of a parent, guardian, or custodian, or of a probation officer or other person appointed by the court, to be brought before the court at the time designated. When not released, such child, pending the hearing of the case, shall be detained in such place as shall be designated by the court, subject to further order.

This section does not forbid any peace officer, police officer, probation officer, or other person authorized by

the juvenile judge from taking into custody any child who is found violating any law or ordinance, or who is reasonably believed to be a fugitive from his parents or from justice, or whose surroundings are such as to endanger his health, morals, or welfare. No child shall be fingerprinted or permitted to be fingerprinted or photographed by any officer or other person holding him in custody without the consent of the judge. When the judge permits the fingerprinting of any child, the prints shall be taken on a civilian and not on a criminal card and shall be kept only in the civilian file. Provided that any child recognized to the court of common pleas, under section 2151.26 of the Revised Code, shall not be exempt from fingerprinting and photographing. In every such case the officer taking such child into custody shall immediately report the fact to the court and the case shall then proceed as provided in sections 2151.01 to 2151.54, inclusive, of the Revised Code."

Section 2151.34 Place of detention for children; district detention homes:

"No child under eighteen years of age shall be placed in or committed to any prison, jail, or lockup, nor shall such child be brought into any police station, vehicle, or other place where such child can come in contact or communication with any adult convicted of crime or under arrest and charged with crime; provided that a child fourteen years of age or older may, for good cause shown, and with the consent of the juvenile judge or a person designated by him, be placed in a place of detention for adults, but in a room or ward separate from adults. All children under eighteen years of age, when confined in such places of juvenile detention, shall not be detained for a period to exceed ninety days during which time a social history can be prepared to include court record, family history, personal history, school and attendance records, and such other pertinent studies and material as will be of assistance

to the juvenile court in its disposition of the charges against such juvenile offenders.

Upon the advice and recommendation of the judge, the board of county commissioners shall provide, by purchase, lease, construction, or otherwise, a place to be known as a detention home, which shall be within a convenient distance of the juvenile court, and not used for the confinement of adult persons charged with criminal offenses, where delinquent, dependent, neglected children, or juvenile traffic offenders may be detained until final disposition. Upon the joint advice and recommendation of the juvenile judges of two or more adjoining or neighboring counties, the boards of county commissioners of such counties shall form themselves into a joint board, and proceed to organize a district for the establishment and support of a detention home for the use of the juvenile courts of such counties, where delinquent, dependent, neglected children, or juvenile traffic offenders may be detained until final disposition, by using a site or buildings already established in one such county, or by providing for the purchase of a site and the erection of the necessary buildings thereon. Such county or district detention home shall be maintained as provided in sections 2151.01 to 2151.54, inclusive, of the Revised Code. In any county in which there is no detention home, or which is not served by such a district detention home, the board of county commissioners shall provide funds for the boarding of such children temporarily in private homes. Children who are alleged to be or adjudged delinquent, dependent, neglected, or juvenile traffic offenders, may, after complaint is filed, be detained in such detention home or certified foster homes until final disposition of their case. The court may arrange for the boarding of such children in certified foster homes or in uncertified foster homes for a period not exceeding sixty days, subject to the supervision of the court,

or may arrange with any county department of welfare which has assumed the administration of child welfare, county child welfare board, or certified organization to receive for temporary care children within the jurisdiction of the court.

In case a detention home is established as an agency of the court, or a district detention home is established by the courts of several counties as hereinbefore provided, it shall be furnished and carried on, as far as possible, as a family home in charge of a superintendent or matron in a non-punitive neutral atmosphere. The judge, or the directing board of a district detention home, may appoint a superintendent, a matron, and other necessary employees for such home and fix their salaries. During the school year, when possible, a comparable educational program with competent and trained staff shall be provided for those children of school age. A sufficient number of trained recreational personnel shall be included among the staff to assure wholesome and a profitable leisure-time activities. Medical and mental health services shall be made available to insure the courts all possible treatment facilities shall be given to those children placed under their care. In the case of a county detention home, such salaries shall be paid in the same manner as is provided by section 2151.13 of the Revised Code for other employees of the court, and the necessary expenses incurred in maintaining such detention home shall be paid by the county. In the case of a district detention home, such salaries and the necessary expenses incurred in maintaining such detention home shall be paid as provided in sections 2151.341 [2151.34.1] to 2151.3415 [2151.34.15], inclusive, of the Revised Code.

In case the court arranges for the board of children temporarily detained in such foster homes, or arranges for such board through any private certified organization, a reasonable sum to be fixed by the court for the

board of such children, shall be paid by the county. In order to have such foster homes available for service an agreed monthly subsidy may be paid and a fixed rate per day for care of children actually residing therein."

Section 2151.35 Informal hearing; procedure; right of child to counsel; disposition:

"The juvenile court may conduct its hearings in an informal manner, and may adjourn such hearings from time to time. In the hearing of any case the general public may be excluded and only such persons admitted as have a direct interest in the case. The juvenile court shall permit a child to be represented by an attorney at law during any hearing before such court and shall extend to such child all the rights and privileges of section 2935.14 of the Revised Code. Such attorney at law, the parents or guardian of such child, and any attorney at law representing them shall be entitled to visit such child at any reasonable time and to be present at any hearing involving the child and shall be given reasonable notice of such hearing.

Any report or part thereof concerning such child which has been prepared by an employee of the court which is used in the hearing and is pertinent thereto shall for good cause shown be made available to any attorney at law representing such child and to any attorney at law representing the parents or guardian of such child, upon written request prior to any hearing involving such child. All cases involving children shall be heard separately and apart from the trial of cases against adults. The court may excuse the attendance of the child at the hearing in cases involving neglected, dependent, or crippled children. The court shall hear and determine all cases of children without a jury. If the court finds that the child is a juvenile traffic offender or is delinquent, neglected, or dependent, it may by order entered proceed as follows:

(A) Place the child on probation, under supervision in its own home, in the custody of a relative, in an institution, or in a certified foster home, wherever situate, upon such terms as the court shall determine; provided that the court may place delinquent children on a free or wage basis in uncertified foster homes. The court shall, at the time of placing the child, determine which school district must bear the cost of educating the child while he is residing at such place as the court directs. The decision of the court concerning the expense of the child's education shall be made a part of the order provided by this section;

(B) Commit the child temporarily or permanently to the division of social administration of the department of public welfare, or to a county department of welfare which has assumed the administration of child welfare, county child welfare board, or certified organization, or to the youth commission or to a county or district training facility created under section 2151.65 of the Revised Code, or to any institution, or to any agency in Ohio or in another state authorized and qualified to provide or secure the care, treatment, or placement required in the particular case;

(C) Impose a fine upon a juvenile traffic offender or a delinquent child not exceeding fifty dollars and costs;

(D) Make such further disposition as the court deems proper;

(E) Commit a male child over sixteen years of age who has committed an act which if committed by an adult would be a felony to the Ohio state reformatory;

(F) Suspend or revoke the operator's or chauffeur's license issued to any minor found to be a juvenile traffic offender;

(G) Suspend or revoke the registration of all motor vehicles registered in the name of any minor found to be a juvenile traffic offender.

Whenever a child commits an act of delinquency before arriving at the age of eighteen years, and the specific complaint thereon is not filed or hearing held until after said child arrives at the age of eighteen years, the court shall have jurisdiction to hear and dispose of such complaint, as if the complaint were filed and hearing held before such child arrived at the age of eighteen years.

The judgment rendered by the court under this section shall not impose any of the civil disabilities ordinarily imposed by conviction, in that the child is not a criminal by reason of such adjudication, nor shall any child be charged or convicted of a crime in any court, except as provided in section 2151.26 of the Revised Code. The disposition of a child under the judgment rendered or any evidence given in the court shall not be admissible as evidence against the child in any other case or proceeding in any other court, except that the judgment rendered and the disposition of such child may be considered by any court only as to the matter of sentence or to the granting of probation. Such disposition or evidence shall not operate to disqualify a child in any future civil service examination, appointment, or application.

Whenever a court commits a child to the division of social administration, the department of public welfare, or to any department, board, institution, or agency it shall transmit with the order of commitment an adequate case history of the child and its family.

With respect to a crippled or otherwise physically handicapped child, who is neither delinquent, neglected, nor dependent, the court may commit the child temporarily to the division or to any agency in Ohio authorized and qualified to provide or secure the care,

treatment, or placement required in the particular case."

Section 2151.38 When jurisdiction of court ceases:

"When a child is committed to the youth commission, or to the Ohio state reformatory, or to the permanent custody of the department of public welfare, or to the division of social administration in said department, or to a county department of welfare which has assumed the administration of child welfare, county child welfare board, or certified organization, the order shall state that such commitment is permanent and the jurisdiction of the juvenile court in respect to the child so committed shall cease and terminate at the time of commitment; except that if the division or any county department, board, or certified organization having such permanent custody makes application to the court for the termination of such custody, the court upon such application, after notice and hearing and for good cause shown, may terminate such custody at any time prior to the child becoming of age. The court shall make disposition of the matter in whatever manner will serve the best interests of the child. All other commitments made by the court shall be temporary and shall continue for such period as designated by the court in its order, or until terminated or modified by the court, or until a child attains the age of twenty-one years."

Section 2151.40 Co-operation required:

"Every county, township, or municipal official or department, including the prosecuting attorney, shall render all assistance and co-operation within his jurisdictional power which may further the objects of section 2151.01 to 2151.54, inclusive, of the Revised Code. All institutions or agencies to which the juvenile court sends any child shall give to the court or to any officer appointed by it such information concerning such child

as said court or officer requires. The court may seek the co-operation of all societies or organizations having for their object the protection or aid of children."

Section 2151.41 Prohibition against abuse of or abetting delinquency of child:

"No person shall abuse a child or aid, abet, induce, cause, encourage, or contribute to the dependency, neglect, or delinquency of a child or a ward of the juvenile court, or act in a way tending to cause delinquency in such child. No person shall aid, abet, induce, cause, or encourage a child or a ward of the court, committed to the custody of any person, department, public or private institution, to leave the custody of such person, department, public or private institution, without legal consent. Each day of such contribution to such dependency, neglect, or delinquency is a separate offense."

Section 2151.42 Prohibition against neglecting or mistreating child:

"No person charged with the care, support, maintenance, or education of a legitimate or illegitimate child or no person being the father of an illegitimate child under eighteen years of age shall fail to care for, support, maintain, or educate such child, or shall abandon such child, or shall beat, neglect, injure, or otherwise ill-treat such child, or cause or allow him to engage in common begging. No person charged with the care, support, maintenance, or education of a legitimate or illegitimate child under twenty-one years of age who is physically or mentally handicapped shall fail to care for, support, maintain, or educate such child. Such neglect, nonsupport, or abandonment shall be deemed to have been committed in the county in which such child may be at the time of such neglect, nonsupport,

or abandonment. Each day of such failure, neglect, or refusal shall constitute a separate offense."

Section 2151.46 Bail:

"Sections 2937.21 to 2937.45, inclusive, of the Revised Code, relating to bail in criminal cases in the court of common pleas, shall apply to adults committed or held under sections 2151.01 to 2151.54, inclusive, of the Revised Code."

Section 2151.47 Jury trial; procedure:

"Any adult arrested under section 2151.01 to 2151.54, inclusive, of the Revised Code, at any time before hearing, may demand a trial by jury, or the juvenile judge upon his own motion may call a jury. Sections 2945.17, and 2945.22 to 2945.36, inclusive, of the Revised Code, relating to the drawing and impaneling of jurors in criminal cases in the court of common pleas, other than in capital cases, shall apply to such jury trial. The compensation of jurors and costs of the clerk and sheriff shall be taxed and paid as in criminal cases in the court of common pleas."

Section 2151.65 Single-county and joint-county juvenile facilities:

"Upon the advice and recommendation of the juvenile judge, the board of county commissioners may provide by purchase, lease, construction, or otherwise a school, forestry camp, or other facility or facilities where delinquent, dependent, or neglected children or juvenile traffic offenders may be held for training, treatment, and rehabilitation. Upon the joint advice and recommendation of the juvenile judges of two or more adjoining or neighboring counties, the boards of county commissioners of such counties may form themselves into a joint board and proceed to organize

a district for the establishment and support of a school, forestry camp, or other facility or facilities for the use of the juvenile courts of such counties, where delinquent, dependent, or neglected children, or juvenile traffic offenders may be held for treatment, training, and rehabilitation, by using a site or buildings already established in one such county, or by providing for the purchase of a site and the erection of the necessary buildings thereon. Such county or district school, forestry camp, or other facility or facilities shall be maintained as provided in sections 2151.01 to 2151.80, inclusive, of the Revised Code. Children who are adjudged to be delinquent, dependent, neglected, or juvenile traffic offenders may be committed to and held in any such school, forestry camp, or other facility or facilities for training, treatment, and rehabilitation.

The juvenile court shall determine:

(A) The children to be admitted to any school, forestry camp, or other facility maintained under this section;

(B) The period such children shall be trained, treated, and rehabilitated at such facility;

(C) The removal and transfer of children from such facility."

Section 2151.99 Penalties:

"(A) Whoever violates section 2151.41 of the Revised Code shall be fined not less than five nor more than one thousand dollars or imprisoned not less than ten days nor more than one year, or both.

(B) Whoever violates section 2151.42 of the Revised Code shall be fined not more than five hundred dollars or imprisoned not more than one year, or both. The juvenile judge may order that such person stand committed until such fines and costs are paid; provided that if he pays promptly to the juvenile court each

week or to a trustee named by such court a sum to be fixed by it for such purpose, sentence may be suspended.

(C) Whoever violates section 2151.421 [2151.42.1] of the Revised Code shall be fined not less than five nor more than one hundred dollars or imprisoned not less than one nor more than ten days, or both."

The Ohio criminal statutes provide in pertinent part:

Section 2901.05 Murder in second degree:

"No person shall purposely and maliciously kill another. Whoever violates this section, except in the manner described in sections 2901.01, 2901.02, 2901.03, and 2901.04 of the Revised Code, is guilty of murder in the second degree and shall be imprisoned for life."

Section 2935.14 Rights of person arrested:

"If the person arrested is unable to offer sufficient bail or, if the offense charged be a felony, he shall, prior to being confined or removed from the county of arrest, as the case may be, be speedily permitted facilities to communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel (or in cases of misdemeanors or ordinance violation for the purpose of arranging bail). He shall not thereafter be confined or removed from the county or from the situs of initial detention until such attorney has had reasonable opportunity to confer with him privately, or other person to arrange bail, under such security measures as may be necessary under the circumstances.

Whoever, being a police officer in charge of a prisoner, or the custodian of any jail or place of confinement, violates this section shall be fined not less than one hundred nor more than five hundred dollars or imprisoned not more than thirty days, or both."

APPENDIX B

Jurisdictions Providing for Right to Jury Trial in Delinquency Hearings

1. Colorado: COLO. REV. STAT. § 22-8-1 (1963)
2. District of Columbia: D.C. CODE ANN. § 16-2307 (Supp. IV, 1965)
3. Kansas: KAN. GEN. STAT. ANN. § 38-808 (1965)
4. Massachusetts: MASS. GEN. LAWS ANN. ch. 119, § 56 (1958) (trial *de novo* in Superior Court)
5. Michigan: MICH. STAT. ANN. § 27.3178 (598.17) (1962)
6. Montana: MONT. REV. CODES ANN. §§ 10-603, 604 (1957)
7. Nebraska: NEB. REV. STAT. § 43-202 (1960)
8. New Mexico: *Peyton* v. *Nord*, —— N.M. ——, —— P.2d ——, 36 U.S.L.W. 2262 (Oct. 16, 1967)
9. Oklahoma: OKLA. STAT. tit. 10, § 102 (1966)
10. South Dakota: S.D. CODE § 43.0331 (1939)
11. Tennessee: *Doster* v. *State*, 195 Tenn. 535, 260 S.W.2d 279 (1953) (by implication)
12. Texas: VERNON'S ANN. CIV. STAT. art. 2338.13 (Supp. 1967)
13. West Virginia: W. VA. CODE ANN. ch. 49-5-6 (1961)
14. Wisconsin: WIS. STAT. ANN. ch. 48.25 (1957)

APPENDIX C

Jurisdictions Providing for Right to Bail or Pre-Hearing Release Under Prescribed Judicial Standards

I. *Bail by statute or decision:*

1. Arkansas: ARK. STAT. ANN. § 45.227 (1964)
2. Colorado: COLO. REV. STAT. § 22-8-6(3) (1963)
3. District of Columbia: *Trimble* v. *Stone,* 187 F.Supp. 483 (1960)
4. Kentucky: *Smith* v. *McCravy,* 1 Crim. L. Rep. 2153 (Ky. Cir. Ct., May 25, 1967)
5. Louisiana: *State* v. *Franklin,* 202 La. 439, 12 So.2d 211 (1943)
6. Massachusetts: MASS. GEN. LAWS ANN. ch. 119, § 67 (1958)
7. Michigan: MICH. STAT. ANN. § 27.3178 (598.17) (1962)
8. South Carolina: S.C. CODE ANN. § 15-1187 (1962)
9. South Dakota: S.D. CODE § 43.0309 (1939).
10. Vermont: VT. STAT. ANN. tit. 33, § 620 (1958)
11. Washington: WASH. REV. CODE ANN. § 13.04.115 (1962)
12. West Virginia: W. VA. CODE ANN. § 49.5.3 (1961)
13. Wisconsin: *Wisconsin ex rel. Allen Mayberry* v. *Administrator,* Juvenile Court Digest, Vol. 1, No. 2, p. 4 (Wis. Cir. Ct. August 4, 1967)

II. *Jurisdictions recognizing right to prehearing release unless there is judicial determination according to specific statutory criteria for detention:*

14. California: CAL. WELF. & INST'NS CODE § 635
15. Florida: FLA. STAT. ANN. § 39.03 (1961)
16. Hawaii: HAWAII FAMILY CT. ACT § 333.16 (1965)
17. Idaho: IDAHO CODE ANN. § 16-1811(1)(c) (Supp. 1967)
18. Illinois: ILL. REV. STAT. ch. 37, § 703-5 (1965)
19. Indiana: IND. ANN. STAT. § 9-3212 (1956)
20. Iowa: IOWA JUVENILE CT. § 232.16 (Supp. 1966)
21. Minnesota: MINN. STAT. ANN. § 260.171 (Supp. 1966)
22. Mississippi: MISS. CODE ANN. § 7185.06 (Supp. 1966)
23. New York: N.Y. FAMILY CT. ACT § 728
24. Utah: UTAH CODE ANN. § 55-10-91(i) (Supp. 1967)